

No. 11923 2537

United States
Circuit Court of Appeals
For the Ninth Circuit.

HOWARD B. MORROW,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California
Central Division

FILED

JUL -2 1948

PAUL P. O'BRIEN,

CLERK

No. 11923

United States
Circuit Court of Appeals
For the Ninth Circuit.

HOWARD B. MORROW,

Appellant,


vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California
Central Division



Digitized by the Internet Archive
in 2010 with funding from
Public.Resource.Org and Law.Gov

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Affidavit of Jesse W. Curtis, Jr.....	60
Affidavit of Jesse W. Curtis, Jr., in Support of Motion to Dismiss.....	8
Exhibit A—Joint Adventure Agreement..	10
Affidavit for Enlargement of Time.....	62
Answer	25
Exhibit A—Mortgage of Chattels.....	29
B—Consent, Waiver and Agree- ment of Indemnity.....	37
Appeal:	
Certificate of Clerk to Transcript of Rec- ord on.....	66
Concise Statement of Points (DC) on Which Appellant Intends to Rely on....	63
Designation (DC) of Contents of Rec- ord on.....	65
Notice of.....	59
Statement of Points and Designation Under Rule 19 (CCA9).....	167
Certificate of Clerk.....	66

INDEX	PAGE
Complaint on Guaranty.....	2
Exhibit "I"—Guaranty	4
Concise Statement of Points (DC) on Which Appellant Intends to Rely on Appeal.....	63
Designation (DC) of Contents of Record on Appeal	65
Exhibits:	
Defendant's Ex. "A"—Letter, 12/2/42 to Morrow Aircraft Corporation from Jay L. Taylor.....	45
Plaintiff's No. 1—Letter, 1/10/43 to Amer- ican National Bank from Morrow Air- craft Corporation.....	43
Judgment	58
Memorandum Opinion.....	46
Minute Order Entered Feb. 4, 1946, Denying Motion to Dismiss.....	24
Motion and Order Extending Time to File Rec- ord and Docket Cause.....	61
Motion to Dismiss for Failure to State a Claim	7
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	59
Notice of Setting for Further Trial.....	42
Proposed Findings of Fact and Conclusions of Law	53
Conclusions of Law.....	57
Findings of Fact.....	53

INDEX

PAGE

Reporter's Transcript of Further Proceedings, Dated April 4, 1947.....	104
Witnesses for Defendant:	
Curtis, Jesse W., Jr.	
—direct	104, 158
Morrow, Howard B.	
—direct	157
—cross	105
—redirect	117
Witnesses for Plaintiff:	
Goodwin, Guy	
—direct	121
—cross	130
—redirect	135
—recross	138
McCook, Ernest	
—direct	140
—cross	143
Reporter's Transcript of Proceedings, Dated Jan. 2, 1947.....	68
Witnesses for the Plaintiff:	
McCauslin, H. E.	
—direct	75
—cross	81
Morrow, Howard B.	
—direct	86
—cross	90
Statement of Points and Designation Under Rule 19 (CCA9).....	167
Stipulation for Reopening Case.....	41

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

CURTIS & CURTIS,
JESSE W. CURTIS, JR.,
207 Andreson Building,
San Bernardino, Calif.

For Appellee:

JAMES M. CARTER,
United States Attorney,
CLYDE C. DOWNING,
Assistant U. S. Attorney,
600 U. S. Post Office &
Court House Bldg.,
Los Angeles 12, Calif. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States in and
for the Southern District of California, Central
Division

No. 4428-BH Civil

UNITED STATES OF AMERICA,

Plaintiff.

vs.

HOWARD B. MORROW,

Defendant.

COMPLAINT ON GUARANTY

Comes Now the United States of America, plaintiff herein by Charles H. Carr, United States Attorney in and for the Southern District of California, Ronald Walker and Wm. W. Worthington, Assistant United States Attorneys in said District, and for its Complaint against the defendant herein above named alleges and states:

I.

Defendant is a resident of the County of Los Angeles, State of California, and within the jurisdiction of this Honorable Court.

II.

Heretofore and on and subsequent to the 18th day of November, 1942, the American National Bank of San Bernardino, California, loaned to Morrow Aircraft Corporation the sum of \$225,000.00, evidenced by a promissory note of the Morrow Aircraft Corporation dated November 18, 1942, in the principal amount of \$225,000.00.

III.

Thereafter the said Morrow Aircraft Corporation defaulted in payment of principal and interest of said loan and that the plaintiff [2] herein, by assignment dated the 29th day of November, 1944, from the American National Bank of San Bernardino, became and now is the owner and holder of said promissory note of November 18, 1942, in the sum of \$225,000.00, which said note is past due and unpaid as to both principal and interest.

IV.

That heretofore and on the 13th day of November, 1942, the defendant herein made, executed and delivered to the American National Bank of San Bernardino his continuing guaranty in the sum of \$100,000.00 for the purpose of guaranteeing in said sum of \$100,000.00 the payment of said note of \$225,000.00; that a photostat of said guaranty is hereto attached, marked "Exhibit I" and made a part hereof.

V.

That heretofore and on the 29th day of November, 1944, the American National Bank of San Bernardino, California, made, executed and delivered to the United States of America an assignment wherein and whereby, among other things, it assigned to the plaintiff herein the aforesaid guaranty of Howard B. Morrow and that plaintiff is now the holder and owner of said guaranty.

VI.

That plaintiff herein has demanded of defendant

the payment in the sum of \$100,000.00 in accordance with the terms of said guaranty, but that defendant has wholly failed and refused and still wholly fails and refuses to pay same or any part thereof, and that there is now due and owing from defendant to plaintiff herein under terms and provisions of the said guaranty the sum of \$100,000.00.

Wherefore, plaintiff prays judgment against the defendant in the sum of \$100,000.00, together with interest at the rate of six per cent (6%) per annum thereon from the 13th day of November, 1944, together with costs and disbursements of this action.

CHARLES H. CARR,
United States Attorney.
RONALD WALKER and
WM. W. WORTHINGTON,
Assistant U. S. Attorneys.

/s/ WM. W. WORTHINGTON,
Attorneys for Plaintiff.

EXHIBIT "I"

GUARANTY

For valuable consideration, the undersigned (hereinafter called Guarantors) jointly and severally guarantee and promise to pay to The American National Bank of San Bernardino (hereinafter called Bank), or order, on demand, in lawful money of the United States, that certain indebtedness of Morrow Aircraft Corporation, (hereinafter called Borrower) to the said Bank, evidenced by a promis-

sory note of even date herewith, in the face amount of \$225,000.00.

The liability of said Guarantors nevertheless, shall not exceed at any time or under any circumstances, the sum of \$100,000.00, but it is expressly understood and agreed that the Bank may receive and apply upon such indebtedness any and all payments from the Borrower without reducing the liability of said Guarantors except insofar and to such extent as the balance of principal and interest due upon the said note shall be reduced thereby below \$100,000.00.

The obligations hereunder are joint and several, and independent of the obligations of Borrower, and a separate action or actions may be brought and prosecuted against Guarantors whether action is brought against Borrower or whether Borrower be joined in any such action or actions; and Guarantors waive the benefit of any statute of limitations affecting their liability hereunder or the enforcement thereof.

Guarantors waive any right to require Bank to (a) proceed against Borrower; (b) proceed against or exhaust any security held from Borrower; or (c) pursue any other remedy in Bank's power whatsoever. Until all indebtedness of Borrower to bank shall have been paid in full, even though such indebtedness is in excess of Guarantors' liability hereunder, Guarantors shall have no right of subrogation, and waive any right to enforce any remedy which Bank now has or may hereafter have against Borrower, and waive any benefit of, and

any right to participate in any security now or hereafter held by Bank. Guarantors waive all presentments, demands for performances, notices of non-performance, protests, notices of protest, notices of dishonor, and notices of acceptance of this guaranty.

All moneys received by the Bank for Borrower may, within the sole discretion of Bank (1) be applied to the payment of interest on or any part of the principal of the indebtedness to which this guarantee relates, (2) be held by the Bank without interest as cash collateral for said loan, or (3) be released to the Borrower, and guarantors waive any right to object to any application [4] of funds made as aforesaid.

In addition to all liens upon, and rights of setoff against the moneys, securities or other property of Guarantors given to Bank by law, Bank shall have a lien upon and a right of setoff against all moneys, securities and other property of Guarantors now or hereafter in the possession of or on deposit with Bank, whether held in a general or special account or deposit, or for safekeeping or otherwise; and every such lien and right of setoff may be exercised without demand upon or notice to Guarantors. No lien or right of setoff shall be deemed to have been waived by any act or conduct on the part of Bank, or by any neglect to exercise such right of setoff or to enforce such lien, or by any delay in so doing; and every right of setoff and lien shall continue in full force and effect until such right of

setoff or lien is specifically waived or released by an instrument in writing executed by Bank.

In Witness Whereof the undersigned Guarantor has executed this guaranty this 13th day of November, 1942.

/s/ HOWARD B. MORROW.

[Endorsed]: Filed May 4, 1945. [5]

[Title of District Court and Cause.]

MOTION TO DISMISS FOR FAILURE TO
STATE A CLAIM

Defendant moves the court to dismiss the action because the complaint fails to state a claim against the defendant upon which relief can be granted in that the alleged cause of action being one based upon a guaranty cannot be properly maintained since the primary obligation upon which it is based is not due and payable, as more particularly appears from the affidavit of Jesse W. Curtis, Jr., attorney for the defendant attached hereto as Exhibit "A".

Dated this 8th day of January, 1946.

JESSE W. CURTIS, JR., and
KENNETH R. HENRY,

By /s/ JESSE W. CURTIS, JR.,
Attorneys for Defendant.

Received a copy of the within Motion this 11th day of Jan. 1946.

CHARLES H. CARR,
United States Attorney.
WM. W. WORTHINGTON,
Assistant U. S. Attorney.

[Endorsed]: Filed Jan. 11, 1946. [7]

[Title of District Court and Cause.]

AFFIDAVIT

State of California,
County of San Bernardino—ss.

Jesse W. Curtis, Jr., being first duly sworn, deposes and says:

That he is an attorney at law duly licensed to practice in all the courts of the State of California, and in the District Court of the United States in and for the Southern District of California, Central Division;

That he is now and has been at all times since prior to November 13, 1942 the attorney for defendant herein; that affiant represented the defendant throughout the entire transaction in which the guaranty marked Exhibit "I" and made a part of the complaint was executed;

That the primary indebtedness referred to in the complaint of the Morrow Aircraft Corporation to the American [8] National Bank of San Bernar-

dino was secured among other things by a chattel mortgage upon all tools, fixtures, equipment, patents and patent rights;

That subsequent to the execution of the said guaranty and on the 19th day of January, 1943, the Morrow Aircraft Corporation, of which the defendant was, and is, president and a major stockholder, said Morrow Aircraft Corporation being the principal debtor underlying the guaranty herein sued upon, entered into a Joint-Adventure Agreement with Fritz Ziebarth which provided among other things that the Morrow Aircraft Corporation would obtain the written consent of the American National Bank of San Bernardino to forebear foreclosure or enforce any lien or claim upon or against any of the tools, fixtures, equipment, patents or patent rights or otherwise interfere with the possession or use thereof during the terms of the agreement; that a copy of said Joint-Adventure Agreement is attached hereto, marked Exhibit "A", and made a part hereof;

That concurrently with the execution of said Joint-Adventure Agreement and for good and valuable consideration the said American National Bank of San Bernardino duly executed a consent, waiver and agreement of indemnity wherein and whereby the said American National Bank of San Bernardino agreed among other things not to foreclose or enforce any lien or claim on or upon any of the tools, fixtures, equipment, patents or patent rights or otherwise interfere with the possession or use of said equipment during the existence of the

Joint-Adventure; that a copy of said consent, waiver and agreement of indemnity is attached hereto, marked Exhibit "B" and made a part hereof;

That said Joint-Adventure Agreement is still in effect and has never been dissolved, terminated or discontinued; [9] that the effect of the consent, waiver and agreement of indemnity hereinbefore referred to was to extend the due date of the note beyond the termination of the Joint-Adventure;

That since no action can yet be instituted against the principal debtor, this action against the guarantor is improper and should be dismissed.

Dated this 8th day of January, 1946.

/s/ JESSE W. CURTIS, JR.

Subscribed and sworn to before me this 8th day of January, 1946.

[Seal] RUTH SHILLING,
Notary Public in and for said County and State.

EXHIBIT "A"

JOINT ADVENTURE AGREEMENT

This Agreement, made and entered into as of the 19 day of January, 1943, By and Between Fritz Ziebarth, an individual whose residence is Reno, Nevada, hereinafter referred to as "Ziebarth," and The Morrow Aircraft Corporation, a California corporation, whose offices are at Rialto, California, hereinafter referred to as "Morrow,"

Witnesseth:

Whereas, Morrow has designed various equip-

ment and appliances deemed valuable by the United States War Department for use in connection with the manufacture of airplanes, and has entered into certain uncompleted contracts with various aircraft corporations for the manufacture and delivery of such equipment, which are represented by various purchase orders, a true list and general description of which is attached hereto as Exhibit "A"; and

Whereas Morrow is financially unable to complete said contracts, and is being pressed by the Army, and the purchasers of said equipment, for its immediate delivery, and is in danger of losing the entire benefits of said contracts, as well as all of its own tools and operating equipment by foreclosure of various existing mortgages unless it can obtain immediate financial assistance; and

Whereas, Morrow and Ziebarth, under date of November 30, 1942, have entered into a co-adventure agreement, with respect to the manufacture of five expendable, plywood tanks for airplanes, in connection with an order from the War Department of the United States, and are desirous of amending said contract so as to make it amendable to all of the terms and conditions hereof; and

Whereas, Morrow is heavily indebted to the American National Bank of San Bernardino, hereinafter referred to as "The Bank," for moneys heretofore advanced, and has executed numerous chattel mortgages and assignments to The Bank, as security for said advances; and

Whereas, it is the purpose of Ziebarth and Morrow to enter into a Joint-Adventure, subject to

the terms hereof, for the manufacture of sufficient equipment and parts to carry out the unfulfilled portions of such of the various purchase orders and contracts as may be determined advisable by Ziebarth, as herein provided, and to manufacture and construct such additional equipment and parts as may be necessary to carry out any and all extensions of such existing contracts and/or purchase orders, and any additional contracts or purchase orders of similar equipment, as may be required by the United States Government, in connection with its prosecution of the present war, either directly or indirectly through other aircraft manufacturing concerns; [11]

Now, Therefore, it is agreed by and between Ziebarth and Morrow, as of the date hereof, that they do form and enter into a Joint-Adventure, under the name and style of Morrow Aircraft-Ziebarth Joint-Adventure," for the sole and exclusive purpose of manufacturing and delivering, director or indirectly, to the United States Government, and the various aircraft concerns mentioned in the contracts and purchase orders hereinafter mentioned, and likewise, subject to the written consent of Ziebarth, any extensions of said existing orders, and any new contracts concerning such equipment or similar equipment and appliances which may be awarded hereafter to the Joint-Adventure.

Ziebarth shall have sixty (60) days from and after the effective date of this agreement within which to determine and designate which, if any, of

the various existing purchase orders described in Exhibit "A" shall be completed by the Joint-Adventure. The purpose of this paragraph is to permit Ziebarth to ascertain and determine the actual cost of manufacturing and delivering the various items of equipment covered by said purchase orders and to negotiate for an increase or adjustment in the sale price of any such equipment with the vendee thereof where deemed advisable. Pending such sixty (60) day period or until five (5) days' written notice of the rejection of any specific purchase order or orders by Ziebarth to Morrow and The Bank, the Joint-Adventure will endeavor to manufacture and deliver a sufficient quantity of such equipment to meet current delivery demands. The Joint Adventure shall in no wise be obligated to continue production of any equipment called for in any of the existing purchase orders after five (5) days from the giving of said written notice of rejection, and after said sixty (60) day period, the Joint-Adventure shall be obligated to manufacture and deliver only such remaining equipment as may be called for in connection with any such existing purchase orders (or modifications thereof) referred to in Exhibit "A" as shall have been specifically approved or accepted in writing by Ziebarth.

It is agreed that the term of said Joint-Adventure shall commence upon the furnishing by Morrow and The Bank of the indemnities and waivers, as hereinafter referred to, and shall expire upon the termination of all contracts, and the fulfillment of any purchase orders, accepted by Ziebarth in behalf of

the Joint-Adventure, and the winding up of its affairs. In this respect, it is further understood and agreed that said Joint-Adventure may be terminated by Ziebarth, after the period of one year, by giving thirty (30) days' written notice to the other party hereto, and the same may be terminated by Morrow, at the end of two (2) years, upon the giving of written notice to such effect to the other party hereto.

Morrow agrees to furnish any and all tools, facilities, fixtures, equipment, patents or patent rights now in its possession, or under its control, for use by the Joint-Adventure, without any rental or charge of any kind, except as herein provided, for the entire period of said Joint-adventure, it being understood however, that the title to said property shall remain, and be, the property of Morrow, except insofar as the same has been mortgaged or pledged to The Bank, Morrow will obtain forthwith the written consent of The Bank for the use, by the Joint-Adventure, of all of the said tools, fixtures, or equipment, patents or patent rights, and will further obtain an agreement from The Bank to forebear foreclosing or enforcing any lien or claim upon, or against, any of the said tools, fixtures or equipment, patents or patent rights, or otherwise interfering with the possession or use thereof during the term of this agreement, except with the consent of Ziebarth. [12]

Morrow also agrees to make available to the Joint-Adventure any rights acquired by virtue of that certain agreement for the manufacture of ply-

wood airplane parts with the Superior Ladder Company, a corporation, under date of June 13, 1942.

Morrow will insure and keep insured against loss by fire, in adequate amounts, all said tools, fixtures or equipment, and all premiums thereon hereafter becoming due shall be advanced by the Joint-Adventure and repaid to the Joint-Adventure prior to distribution of profits to Morrow. In the event of any loss or damage by fire, any insurance recovery shall be used for the replacement, or repair, of destroyed or damaged equipment as then required by the Joint-Adventure, and any overplus remaining shall be paid to Morrow, or its assigns. All such equipment so replaced or repaired shall be and remain the property of Morrow.

Ziebarth agrees to advance all necessary operating capital, to run and operate the equipment and facilities, so furnished by Morrow and to complete such of the aforementioned unfulfilled contracts, as well as any extensions thereof, or other contracts as may be expressly approved by Ziebarth, and for the furnishing of equipment, or otherwise accomplishing the purpose of this Joint-Adventure, as above stated. In lieu of advancing money, Ziebarth may, at his option, purchase and furnish any specific equipment needed for the operations of the Joint-Adventure, in which event the title thereto shall remain in his name, until sufficient funds are available from the operations of the Joint-Adventure, to reimburse him for the purchase price thereof, whereupon title thereto shall be trans-

ferred to the Joint-Adventure. In the event of the termination of this Joint-Adventure, prior to the payment to Ziebarth of the purchase price of any equipment the Joint-Adventure shall pay to Ziebarth a reasonable rental for the use of said equipment.

It is agreed that Exhibit "A" hereto attached correctly sets forth the number of each existing purchase order, the number and nature of items ordered, the vendee, and the number of items (or the contract price of materials) not yet completed or delivered by Morrow. It is distinctly understood and agreed that this Joint-Adventure shall apply only to such of the undelivered items referred to in said existing contracts, or orders, as may be delivered by the Joint-Adventure, and that Morrow, or its assigns, shall be entitled to receive such unpaid sums as may be due according to the unit price as specified in the order or contract, for such units as have actually been delivered by Morrow and that the Joint-Adventure is to receive all moneys due on account of any deliveries made by it as herein provided. Morrow agrees to execute an assignment of all its right, title and interest in and to the unperformed portions of said contracts, or orders, and the proceeds therefrom to the Joint-Adventure, insofar as the same may be feasible, or possible, and further, agrees to execute a power of attorney to Ziebarth, or his agent, so as to permit the endorsement of any checks, or warrants representing payment, or payments, on account of deliveries made by the Joint-Adventure so that the

same may be deposited in the Joint-Adventure bank account, and Morrow will obtain from the Bank a waiver of any and all rights it may have in and to any of the aforesaid proceeds from deliveries made by the Joint-Adventure, and an agreement that the same may be deposited in the Joint-Adventure account, pursuant to the terms thereof. [13]

All moneys payable to the Joint-Adventure, under the terms hereof, shall be deposited in the Citizens' National Trust and Savings Bank of Los Angeles, Los Angeles, California, and/or The American National Bank of San Bernardino, in an account entitled "Morrow Aircraft-Ziebarth Joint-Adventure," and shall be paid out only upon the written order of Ziebarth, or other person, or persons personally authorized by him, in writing, so to do. The funds of the Joint-Adventure shall be used only for the purpose of paying the costs and expenses of its operations, and in re-payment to Ziebarth of funds, or property, advanced or furnished by him, and in distribution of profits to the parties.

In the conduct of the Joint-Adventure operations, Morrow agrees to cooperate in the direction of all engineering, designing, and construction work, and to furnish the Joint-Adventure with all engineering data, designs, or information now in its possession, which may be of assistance in accomplishing the purpose of the Joint-Adventure.

Ziebarth shall have complete control of the hiring and firing of all personnel, the fixing of all salaries, the purchase of all equipment, expenditure of all moneys, accounting, preparation of statements, and

the general operation of the business of the Joint-Adventure. Ziebarth may insure the operations provided for in this agreement against loss by reason of damage to persons or property by either Ziebarth or Morrow in the operation of the business. The cost of such insurance shall be considered as one of the necessary costs in the conduct of the operations. The sole interest of Morrow in the assets of the Joint-Adventure shall be its right to participate in the profits if any and to receive such share of the property of said Joint-Adventure as may remain after the payment of all its obligations upon the termination of this Joint-Adventure, Morrow shall have no right to incur any obligations, in behalf of said Joint-Adventure, or to enter into any negotiations whatever in its behalf, without the written consent, or approval, of Ziebarth. The profits arising from the Joint Adventure and the Property remaining upon the termination of this Joint-Adventure shall be divided fifty-one per cent (51%) to Ziebarth, and forty-nine per cent (49%) to Morrow, or its assigns.

Morrow or The Bank shall cause to be deposited in a special account entitled "Morrow Aircraft-Ziebarth, Trustee," with The Bank the sum of \$25,000.00 to indemnify Ziebarth as against any loss or expense which may be sustained by him in connection with the completion of any existing purchase orders described in Exhibit "A" (except the War Department contract for the manufacture of plywood tanks) subject to the following terms and conditions:

(a) The term "loss" as herein used shall be construed to mean the difference, if any, between the actual cost of manufacturing and delivering the undelivered parts or equipment and the amount actually received by the Joint-Adventure for such parts or equipment. The term "actual cost" shall include all costs, including overhead and direct costs, which overhead and indirect costs, however, shall not exceed one hundred per cent of the direct labor used in manufacturing and delivering said equipment. Said loss shall be computed only after the completion by Ziebarth of all existing orders accepted by him as herein provided, and shall likewise refer to any operation in connection with the existing contracts which may be partially completed by Ziebarth but later rejected by him during the sixty-day period as aforesaid. [14]

(b) The amount of said fund which shall be available to Ziebarth by way of indemnification shall be in direct proportion to the value of deliveries made by the Joint-Adventure on account of the unfulfilled portions of said existing purchase orders—that is to say, the total amount of indemnification payable out of said fund shall be an amount equal to the product obtained by multiplying the sum of \$25,000.00 by the fraction obtained by using as the denominator the total value of undelivered items called for in said existing purchase orders as of the effective date of this agreement and as

the numerator the total value of deliveries actually made by the Joint-Adventure.

(c) Funds may be withdrawn from said account by Ziebarth upon his filing with the bank a certificate showing the actual loss sustained as herein provided and supported by data showing the cost of production, the total amount of deliveries and the amount received therefor.

(d) Any funds remaining in said account after payment to Ziebarth of such funds as he may be entitled to on account of losses sustained shall belong to The Bank.

Morrow agrees to obtain releases from any and all labor contracts, or bonus arrangements, that may be in existence, in connection with any of the contracts, or orders referred to in Exhibit "A," it being understood and agreed that the Joint-Adventure shall not be liable on account of any such contracts. The Joint-Adventure shall not be liable for any existing obligations on the part of Morrow, and Morrow hereby agrees to indemnify and hold harmless the Joint-Adventure and Ziebarth as against any and all loss or expense incurred by either on account of any existing obligations, social security taxes, unemployment taxes, income taxes, sales tax, and the like, insofar as said obligations may be, or become, a lien, or charge, or claim against the assets of the Joint-Adventure, or Ziebarth, by reason of this agreement, or any operations pursuant thereto, or otherwise, Morrow, likewise, agrees to indemnify Ziebarth, and the Joint-Adventure, as against any and all costs and expenses, including attorney's fees,

which may be reasonable incurred in defendant, prosecuting, or appearing in any action, or proceeding, which may be brought by, or against, either of them or their property on account of any such obligations, taxes, or claims. In this connection Morrow likewise agrees to cause to be deposited with the Bank an additional sum of \$25,000.00 in a special fund which said sum shall be used by said Bank as a deposit to secure the faithful performance of any and all obligations of Morrow in this paragraph set forth and described, including any obligation to Ziebarth arising by reason of the foregoing indemnities is not paid, the same may be charged against and satisfied out of any profit of said Joint-Adventure to which Morrow may become entitled.

Morrow agrees to sell to the Joint-Adventure all usable material inventories, now in its possession, at the cost price thereof, which amounts are to be paid out of the funds of the Joint-Adventure.

Upon the termination of this Joint-Adventure all fixtures and property, the title to which stands in the name of either of the parties hereto, shall be held by such party, free and clear from any and all claims of either party or of the Joint-Adventure, and all property and assets of the Joint-Adventure which remain, after reimbursing Ziebarth for all moneys advanced to said Joint-Adventure, and the reasonable rental value of any equipment furnished by him, shall be divided between the parties hereto, in accordance with their respective interests. [15]

Neither Ziebarth, nor Morrow, shall receive any

compensation for services rendered to, or on account of, the operations of the Joint-Adventure. The salaries and compensation of all labor and personnel, engaged in the undertaking shall be paid by the Joint-Adventure.

All records and accounts of operations of the Joint-Adventure shall, at all times, be open to the inspection of each of the parties, and their representatives, and each of the parties shall be kept fully informed as to all of the operations of the Joint-Adventure. It is agreed that, at the end of each six months' period, or such other period as may be agreed upon, there shall be an accounting, covering operations during said period, and a determination and distribution of any profits realized therefrom. No profits, however, shall be distributed until Ziebarth has been repaid any and all sums advanced by him, and for any equipment purchased by him for use in connection with the operations of the Joint-Adventure.

Morrow agrees to supply the Joint-Adventure with a complete inventory of all facilities, equipment, tools, fixtures, and patents and also a complete inventory of all usable materials on hand, together with the costs of such materials, within five (5) days after the execution of this agreement.

Morrow will obtain from the Bank an agreement to subordinate any and all rights it may have in and to the proceeds from the undelivered portions of any purchase orders or contracts now existing or hereafter obtained, to the rights of the Joint-Adventure as herein provided.

This agreement shall supersede the aforesaid agreement of November 30, 1942, between Morrow and Ziebarth and shall control in all respects, where inconsistent therewith, except as to the indemnification deposit as heretofore stated.

It is expressly understood and agreed that the undertakings hereinabove recited shall constitute a Joint-Adventure, and will be strictly limited, in its operations, to the purposes for which it is entered into, and that neither party shall permit any extension of its operations beyond the limits herein prescribed, under any circumstances whatsoever.

In Witness Whereof, the parties hereto have caused this agreement to be executed the day and year first above written.

FRITZ ZIEBARTH,
MORROW AIRCRAFT
CORPORATION,

By: F. A. MORROW,
V. Pres.

By: LUCIEN H. OUTMAN,
Sec'y. [16]

[Exhibit "B," hereto attached, is identical with Exhibit "B" attached to Answer, and is set forth in full on pages 37 to 40.]

Received a copy of the within affidavit this 11th day of Jan., 1946.

/s/ CHAS. H. CARR,
U. S. Atty.

/s/ WM. WORTHINGTON,
Asst. U. S. Atty.

[Endorsed]: Filed Jan. 11, 1946. [20]

At a stated term, to wit: The February Term, A.D. 1946, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday, the 4th day of February, in the year of our Lord one thousand nine hundred and forty-six.

Present: The Honorable Ben Harrison,
District Judge.

[Title of Cause.]

MINUTE ORDER DENYING MOTION
TO DISMISS

This cause coming on for hearing motion of the defendant to dismiss this action on the ground that the complaint fails to state a claim, pursuant to notice, motion, and affidavit, filed January 11, 1946; Wm. W. Worthington, Assistant U. S. Attorney, appearing as counsel for the Government; Jesse W. Curtis, Jr., Esq., appearing as counsel for the defendant:

The Court makes a statement and orders that the said motion of defendant to dismiss is denied and that twenty days is allowed to answer the complaint.

[Title of District Court and Cause.]

ANSWER

In answer to plaintiff's complaint, defendant admits, denies and alleges as follows:

I.

Answering Paragraph I thereof, defendant admits that he is within the jurisdiction of the above entitled court, but except as expressly admitted herein, he denies generally and specifically each and every allegation contained in said paragraph.

II.

Admits all the allegations contained in Paragraph II of said complaint.

III.

In answer to Paragraph III thereof, the defendant alleges that he has no information or belief on the subject of the assignment of said promissory note to the plaintiff by the American National Bank of San Bernardino, and basing his denial on this ground, denies that plaintiff became or now is the owner or holder of the promissory note. Except as to those matters denied upon [22] lack of information and belief, defendant denies generally and specifically each and every allegation therein contained.

IV.

Answering Paragraph IV of plaintiff's complaint, defendant alleges that heretofore and on November 13, 1942, he made, executed and delivered to the American National Bank of San Bernardino, a cer-

tain guarantee wherein and whereby this defendant purported to guarantee a certain indebtedness of Morrow Aircraft Corporation to said bank, evidenced by a promissory note of even date therewith in the face amount of \$225,000.00, said guarantee, however, being limited by the terms thereof to the sum of \$100,000.00. A copy of said guarantee is annexed to plaintiff's complaint herein, marked Exhibit "I," to which reference is hereby made. Except as expressly admitted, defendant denies generally and specifically each and every allegation contained in said paragraph.

V.

Answering Paragraph V of plaintiff's complaint, defendant alleges that he has no information or belief on the subject sufficient to enable him to answer the allegations therein contained, and basing his denial upon that ground, denies generally and specifically each and every allegation therein contained.

VI.

Answering Paragraph VI of plaintiff's complaint, defendant denies that there is now due or owing from the defendant to the plaintiff herein under the terms or provisions of said guarantee or otherwise, the sum of \$100,000.00, or any other sum or sums whatever.

For a Further, Separate and Second Defense, Defendant Alleges as Follows:

I.

Concurrently with the execution of the said prom-

issory note [23] by Morrow Aircraft Corporation referred to in Paragraph II of plaintiff's complaint, and of even date therewith and as security therefor, the said Morrow Aircraft Corporation executed a chattel mortgage covering all furniture, fixtures, machinery, equipment, tools, tooling and accessories more particularly described therein. Annexed hereto, marked Exhibit "A," and made a part hereof is a true and correct copy of the said note and chattel mortgage.

II.

That on the 13th day of November, 1942, the defendant executed the guarantee referred to in plaintiff's complaint, by the terms of which the defendant purportedly guaranteed the payment of a certain note therein described.

III.

That on the 19th day of January, 1943, the Morrow Aircraft Corporation entered into a Joint Adventure Agreement with Fritz Ziebarth, which provided among other things that Morrow Aircraft Corporation would deliver to the new joint adventure for use in the operations contemplated by said joint adventure certain of its assets including the furniture, fixtures, machinery and equipment, tools, tooling and accessories described in the aforementioned chattel mortgage; that a true and correct copy of the said joint adventure agreement is annexed to the affidavit of Jesse W. Curtis, Jr., on file herein and to which reference is hereby made.

IV.

On the 19th day of January, 1943, the American National Bank of San Bernardino, for good consideration, executed a "Consent, Waiver and Agreement of Indemnity," providing among other things that said bank would not enforce its lien or claim upon the furniture, fixtures, machinery and equipment, tools, tooling and accessories described in said chattel mortgage during the existence of the said joint adventure. A true and correct copy of said "Consent. Waiver and Agreement of Indemnity" is [24] annexed hereto, marked Exhibit "B" and made a part hereof.

V.

That at the time of the commencement of this action, said Joint Adventure agreement was still in full force and effect and had never been dissolved, terminated or discontinued. At the time this action was commenced, no cause of action existed upon said promissory note against the Morrow Aircraft Corporation; the primary debtor, nor did any cause of action exist upon the guaranty as against this defendant.

For a Further, Separate and Third Defense, the Defendant Alleges as Follows:

I.

Defendant hereby incorporates Paragraphs I, II, III, and IV of his further, separate and second defense herein the same as if fully set forth.

II.

That the Consent, Waiver and Agreement of Indemnity hereinbefore referred to materially altered and extended the due date of the promissory note; that said alteration and extension was entered into without the knowledge or consent of the defendant, and that by reason of such alteration and extension the defendant is exonerated from the payment of the guarantee set forth in plaintiff's complaint.

Wherefore, defendant prays that plaintiff take nothing by its action and that the defendant be awarded his costs of suit and such other relief as to the court may seem just.

/s/ JESSE W. CURTIS, JR.,
Attorney for Defendant. [25]

EXHIBIT "A"

MORTGAGE OF CHATTELS

This Mortgage, made the 18th day of November, 1942, by Morrow Aircraft Corporation, a California corporation, of the City of Rialto, County of San Bernardino, State of California, by occupation Manufacture of aircraft pilot seats and sub-assemblies, herein called Mortgagor, and The American National Bank of San Bernardino of City of San Bernardino, County of San Bernardino, State of California, by occupation a National Banking Association, herein called Mortgagee,

Witnesseth:

That the Mortgagor mortgages to the Mortgagee

all the following described personal property, together with the natural increase and the products thereof, if any, situated in the City of Rialto, County of San Bernardino, State of California, and described as follows, to wit:

All furniture, fixtures, machinery and equipment, tools, tooling, and accessories now owned or hereafter acquired by the Mortgagor and used in connection with the operation of the manufacturing plant belonging to the Mortgagor, and situate in and upon the premises known and described as 101, 104, 109, 114, 116, 118, 128, 131, 135, 137 and 210 South Riverside Avenue, City of Rialto, County of San Bernardino, State of California.

Inventory of all such furniture, fixtures, machinery and equipment, tools and tooling and accessories now owned by the Mortgagor being annexed hereto. [26]

as security for the payment to Mortgagee of Two Hundred Twenty-five thousand & No/100 Dollars (\$225,000.00), with interest thereon according to the terms of Mortgagor's promissory note of even date herewith, in words and figures as follows:

San Bernardino, California
November 18, 1942.

Promissory Note—\$225,000.00

On Demand, or if no demand is made, then on or before November 15, 1943, for value received, the

undersigned corporation promises to pay to the order of The American National Bank of San Bernardino, California, a National Banking Association, Two Hundred Twenty-five Thousand & No/100 Dollars, with interest thereon from date until paid, at the rate of Five per cent per annum, payable quarterly, and if not paid when due, to be added to the principal and bear like interest.

The makers and endorsers of this note hereby waive diligence, demand, protest and notice, and in case suit is instituted to collect this note, agree to pay reasonable attorney's fees. This note is payable in lawful money of the United States at the American National Bank of San Bernardino, California.

MORROW AIRCRAFT
CORPORATION,

By

P.O.....

By

P.O.....

This mortgage also secures: (a) Any and all renewals of said promissory note; (b) the repayment of all sums and amounts that may be necessarily advanced or expended by Mortgagee for the maintenance or preservation of the mortgaged property, or any part thereof; (c) to the maximum extent and amount of Two Hundred Twenty-Five Thousand & No/100 Dollars (\$225,000.00), any and all other sums that may hereafter be advanced by Mortgagee to or for the benefit of Mortgagor, any and all other expenditures that may hereafter be made by Mort-

gagee pursuant to the provisions hereof or for the benefit of or at the instance of Mortgagor, and any and all other indebtednesses and obligations of Mortgagor to Mortgagee that may hereafter be incurred.

Mortgagor hereby warrants that he is the sole owner and in possession of all of said mortgaged property and that said property is free and clear of all liens, encumbrances and adverse claims, with the exception of the lien of this mortgage. Mortgagor agrees to appear in and defend any and all actions and proceedings affecting title to said mortgaged property, or any part thereof, or affecting the security interest of Mortgagee therein.

Mortgagor hereby agrees: to do all acts which may be necessary to maintain, preserve and protect said mortgaged property and to keep said property in good condition and repair; not to commit or permit any waste of said property; to keep said property separate and always capable of identification; to pay, at least ten (10) days before delinquency, all taxes, assessments and liens now or hereafter imposed upon said property; to provide, maintain and deliver to Mortgagee fire and other insurance policies covering said property in amounts and companies satisfactory to Mortgagee and with loss payable to Mortgagee; not to sell, contract to sell, lease, encumber, dispose of or permit the consumption of all or any part of said property, and not to remove the same from the premises on which it is now located without the written consent of Mortgagee.

If Mortgagor fails to make any payment or do any act as herein required, then Mortgagee, but without obligation so to do, and without notice to or demand upon Mortgagor, may make such payments and do such acts as Mortgagee may deem necessary to protect its security interest in said property, Mortgagee being hereby authorized (without limiting the general nature of the authority hereinabove conferred) to take possession of said property, or any part thereof, and to pay, purchase, contest or compromise any encumbrance, charge or lien which in the judgment of Mortgagee appears to be prior or superior to the lien of this mortgage, and in exercising any such powers and authority to pay necessary expenses, employ counsel and pay the reasonable fees. Mortgagee's determination [27] as to whether or not Mortgagor has failed to make any payment or do any act as herein required shall be final and conclusive. Mortgagor hereby agrees to repay immediately, and without demand, all sums so expended by Mortgagee pursuant to the provisions of this paragraph, with interest from date of expenditure at the rate of five per cent (5%) per annum.

In the event there shall hereafter be a decrease in the value of said mortgaged property, Mortgagor agrees to give to Mortgagee further security or to make payments on account to Mortgagee in an amount or to the extent sufficient to offset said decrease in value.

If Mortgagor shall default in the payment of any or all of the indebtednesses, obligations and liabilities

ties secured hereby, or shall default in the performance of any agreement herein contained, or if any or all of said property be hereinafter sold, leased, encumbered or otherwise disposed of, without the consent of Mortgagee, then Mortgagee, at its option, without demand upon or notice to Mortgagor, may declare all indebtednesses, obligations and liabilities secured hereby to be immediately due and payable, and Mortgagee may proceed to foreclose this mortgage according to law, or may, at its option, and it is hereby empowered so to do, with or without foreclosure action, enter upon the premises where said property, or any part thereof, may be and take possession thereof; and remove or sell and dispose of said property, or any part thereof, at public or private sale, without any previous demand of performance or notice to Mortgagor of any such sale, notice of sale and demand of performance and all other notices and demands being hereby expressly waived by Mortgagor. Said property, or any part thereof, may be sold in one or more lots, and at one or more sales, which may be held on different days and which need not be held within view of the property being sold. Mortgagee shall deduct and retain from the proceeds of such sale or sales all costs and expenses paid or incurred in the taking, removal, and sale of said property, including any reasonable attorneys' fees incurred or paid by Mortgagee; the balance of the proceeds shall be applied by Mortgagee upon the indebtedness, obligations and liabilities secured hereby, in such order and manner as the Mortgagee may determine, and the surplus, if

any, shall be paid to the Mortgagor or to the person or persons lawfully entitled to receive the same.

In the event that an action be brought to foreclose this mortgage, there shall be due from Mortgagor to the plaintiff therein, immediately upon the commencement of such action, an attorneys' fee of One Hundred Dollars (\$100.00), and, in the event that the action goes to judgment, a further attorneys' fee, equal to five per cent (5%) of the amount found due, which sums Mortgagor agrees to pay, and shall be included in the judgment in said action.

In any action of foreclosure plaintiff shall be entitled to the appointment of a Receiver, without notice, to take possession of all or any part of said mortgaged property and to exercise such powers as the Court shall confer upon him.

At any sale or sales made under this mortgage, or authorized herein, or at any sale or sales made upon foreclosure of this mortgage, Mortgagee (or its representative) may bid for and purchase any property being sold, and, in the event of such purchase, shall hold such property thereafter discharged of all rights of redemption.

Mortgagor hereby assigns to Mortgagee all sums now or hereafter payable to Mortgagor as the proceeds of sale of said mortgaged property, or any part thereof, and any and all sums now or hereafter payable to Mortgagor under the terms of any agreement for the sale or marketing of said property, or any part thereof; provided, however, that nothing in this paragraph contained shall be construed to waive or in any way affect the lien of this

mortgagee or the limitations, hereinabove expressed, upon the Mortgagor's right to deal with said property, without Mortgagee's written consent.

Mortgagee shall be entitled to enforce any indebtedness, obligation or liability secured hereby and to exercise all rights and powers hereby conferred, although some or all of the indebtednesses, obligations and liabilities secured hereby are now or shall hereafter be otherwise secured. Mortgagee's acceptance of this mortgage shall not affect or prejudice Mortgagee's right to realize upon or enforce any other security now or hereafter held by Mortgagee, and Mortgagee shall be entitled to exercise all rights of set-off and of banker's lien to the same effect and in the same manner as if this mortgage had not been given.

Any Mortgagor who is a married woman and who has joined in the execution of the said promissory note hereinabove set forth hereby expressly agrees to the liability of her separate property for all the indebtednesses and obligations hereby secured, but without hereby creating a present or any lien or charge thereon.

The words "Mortgagor" and "Mortgagee," as used herein, shall be construed to include the heirs, legatees, devisees, administrators, executors, successors and assigns of Mortgagor and Mortgagee. This mortgage shall bind and inure to the benefit of said third persons. Whenever the context so requires, the masculine gender includes the feminine or neuter, the singular number includes the plural and vice versa.

In Witness Whereof, Mortgagor has executed these presents the day and year first above written.

[Seal]

MORROW AIRCRAFT
CORPORATION,

By HOWARD B. MORROW

By FRANCES MASIOKUS. [28]

EXHIBIT "B"

CONSENT, WAIVER, AND AGREEMENT OF INDEMNITY

In consideration of the terms and conditions of that certain Joint-Adventure Agreement, entered into as of the 19th day of January, 1943, between Fritz Ziebarth, herein referred to as Ziebarth, an individual, of Reno, Nevada, and The Morrow Aircraft Corporation, a California corporation, of Rialto, California, hereinafter referred to as Morrow, and the execution and delivery of a certain assignment by Morrow, contemporaneously herewith, the undersigned, the American National Bank of San Bernardino, hereinafter referred to as The Bank, hereby consents to the use of the various equipment, tools, facilities, fixtures, patents, and patent rights, now in the possession of Morrow, or under its control by the Joint-Adventure, as provided in said Joint-Adventure Agreement, and further, agrees not to foreclose, or enforce any lien or claim, on, or upon, any of said tools, fixtures, equipment, patents, or patent rights, or otherwise interfere with the possession or use of said equip-

ment during the existence of said Joint-Adventure, except by the written consent of Ziebarth.

The undersigned, likewise, waives any rights it may have in and to the proceeds from the unperformed portions of any of the contracts, or orders, described in Exhibit "A," of said Joint-Adventure Agreement, that are subject to said Joint-Adventure, and hereby consents to the deposit of said proceeds, from deliveries made after the effective date of said agreement, in said Joint-Adventure account.

The undersigned certifies that it now has on deposit, in an account entitled "Morrow Aircraft-Ziebarth, Trustee," the sum of \$25,000.00, which amount is to be used to indemnify Ziebarth as against any loss or expense, which may be sustained by him, or the Joint [30] Adventure, in connection with the completion of any existing purchase orders, described in Exhibit "A," (except the War Department contract for the manufacture of plywood tanks), subject to the following terms and conditions:

(a) The term "loss," as herein used, shall be construed to mean the difference, if any, between the actual cost of manufacturing and delivering the undelivered parts or equipment, and the amount actually received by the Joint-Adventure for such parts or equipment. The term "actual cost" shall include all costs, including overhead and indirect costs, which overhead and indirect costs, however, shall not exceed one hundred percent of the direct labor used in manufacturing and delivering said

equipment. Said loss shall be computed only after the completion by Ziebarth of all existing orders accepted by him as provided in said Joint-Adventure Agreement, and shall likewise refer to any operations in connection with existing contracts which may be partially completed by Ziebarth but later rejected by him during the sixty-day period as therein provided.

(b) The amount of said fund which shall be available to Ziebarth by way of indemnification shall be in direct proportion to the value of deliveries made by the Joint-Adventure on account of the unfulfilled portions of said existing purchase orders—that is to say, the total amount of indemnification payable out of said fund shall be an amount equal to the product obtained by multiplying the sum of \$25,000.00 by the fraction obtained by using as the denominator the total value of undelivered items called for in said existing purchase orders as of the effective date of this agreement and as the numerator the total value of deliveries actually made by the Joint-Adventure.

(c) Funds may be withdrawn from said account by Ziebarth upon his filing with the bank a certificate showing the actual loss sustained as herein provided and supported by data showing the cost of [31] production, the total amount of deliveries and the amount received therefor.

(d) Any funds remaining in said account after payment to Ziebarth of such funds as he may be entitled to on account of losses sustained shall belong to The Bank.

The undersigned, likewise, certifies that it has on deposit the additional sum of \$25,000.00, in an account entitled "Morrow Aircraft Corporation Special Account," which money will be used for the purpose of paying existing liabilities of Morrow, such as social security taxes, unemployment taxes, income taxes, sales taxes, and any other obligations which may become a lien or charge or claim against the assets of the Joint-Adventure, or Ziebarth, and to further secure the performance by Morrow of his obligations to indemnify Ziebarth as provided in that paragraph of the said Joint-Adventure Agreement commencing at Line 5, Page 9, thereof and relating to payment by Morrow of existing obligations, taxes and claims.

Dated this 19th day of January, 1943.

THE AMERICAN
NATIONAL BANK
OF SAN BERNARDINO.

By /s/ EARNIST McCOOK,
Cash. [32]

State of California,
County of San Bernardino—ss.

Howard B. Morrow being by me first duly sworn, deposes and says that he is the Defendant in the above entitled action; that he has read the foregoing Answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

/s/ HOWARD B. MORROW.

Subscribed and sworn to before me this 12th day of March, 1946.

[Seal] /s/ RUTH SHILLING,

Notary Public in and for said County and State of California. [33]

Received copy of the within Answer this 13th day of March, 1946.

CHAS. H. CARR,

United States Attorney.

/s/ WM. W. WORTHINGTON,

Assistant U. S. Attorney.

[Endorsed]: Filed March 13, 1946. [34]

[Title of District Court and Cause.]

STIPULATION

It Is Stipulated by and between the parties hereto through their respective attorneys, that the above-entitled cause may be reopened for the reception of further evidence.

Dated: January 7, 1947.

/s/ JAMES M. CARTER,

U. S. Attorney.

/s/ CHARLES H. VEALE,

Asst. U. S. Atty.,

Attorney for Plaintiff.

JESSE W. CURTIS, JR.,

By KENNETH R. HENRY,

Attorney for Defendant.

[Endorsed]: Filed March 4, 1947. [35]

[Title of District Court and Cause.]

NOTICE BY THE CLERK

James M. Carter, U. S. Attorney; Charles H. Veale, Asst. U. S. Atty., 600 Federal Building, Los Angeles 12, Calif. Jesse W. Curtis, Jr., Attorney at Law, 415 Andreson Building, San Bernardino, Calif.:

You are hereby notified that the above-entitled cause was this day ordered this cause is set for April 4, 1947, 10 a.m., for further trial. Stipulation of counsel is filed this day.

Dated: Los Angeles, California, March 4, 1947.

EDMUND L. SMITH,
Clerk.

By MURRAY E. WISE,
Deputy Clerk. [36]

Reunited Exhibit No. 1

San Bernardino, California
January 10, 1943

American National Bank
San Bernardino, California

Gentlemen:

In our agreement with Fritz Zeibarth, informing the Morrow Aircraft - Zeibarth joint-adventure, this bank will be required to make the following commitments:

1. Bank shall consent to the execution of the joint-adventure agreement by Morrow.
2. Bank shall consent to the use of all tools, fixtures, and equipment, patents and patent rights now in possession of Morrow by the joint-adventure and bank shall agree to forbear foreclosing or enforcing any lien or any claim upon or against any of the tools, fixtures or equipment, patents or patent rights, or otherwise interfering with the possession or use thereof during the term of the joint-adventure agreement except with the consent of Zeibarth.
3. Bank shall waive any and all rights it has in and to any of the proceeds from deliveries made after the effective date of this agreement upon existing purchase orders, and bank shall consent that the aforesaid proceeds may be disbursed to the joint-adventure account (you may provide, however, if you deem it advisable, that the foregoing waiver shall in no way affect any lien or claim of the bank upon any and all payments made by the joint-adventure to Morrow so long as Morrow is indebted to the bank.)
4. The bank shall represent that ^{there} it has been deposited with it the sum of \$25,000. which it will use to pay any losses sustained by Zeibarth in completing the existing orders or contracts referred to in Exhibit "A" attached to the joint-adventure agreement.
5. The bank shall represent that there has been deposited with it an additional sum of \$25,000. from which it will pay any existing obligations on the part of Morrow Aircraft including social security taxes, unemployment taxes, income taxes, sales taxes, and the like, and any obligation which may hereafter arise on the part of Morrow to Zeibarth arising out of the indemnity provisions of the joint-adventure agreement wherein Morrow agrees to indemnify Zeibarth and the joint-adventure against any and all existing obligations, and wherein Morrow further agrees to indemnify Zeibarth and the joint-adventure against any and all expenses, including attorney's fees which may be reasonably incurred in defense or appearing in any action or proceeding which may be brought against either of them or their

** To be revised*
1/11/43

2 COPIES TO BURN
104h

#2.

American Natl. Bank

1-10-43

property on account of any such obligations, taxes or claims.

As soon as we have these commitments, the joint-adventure agreement can be entered into.

Yours very truly,

MCGRATH AIRCRAFT CORPORATION

By

Charles B. McRath resident

[Endorsed]: Filed Jan. 2, 1947

DEFENDANT'S EXHIBIT A

Office of Liaison Officer
Fiscal Division

Federal Reserve Bank Building
Los Angeles, California

December 2, 1942

Morrow Aircraft Corporation
Box 1029
Rialto, California

Attention Mr. Howard B. Morrow

Gentlemen:

In checking over the Morrow Aircraft file, I find I have never verified our oral conversation concerning Mr. Guy Goodwin's status.

As I told you and Miss Masiokus, Mr. Goodwin is being placed in charge of Morrow Aircraft by the banking institution, Federal Reserve Bank and the War Department, and is in complete charge of all Morrow Aircraft operations. He has authority to hire, fire, lower and raise salaries any way he sees fit, and his salary is set at \$400 per month with the understanding with me that when and if the company is placed on a paying basis, we will then consider him for a raise.

I have the utmost confidence in Mr. Goodwin's ability to work harmoniously with you and all the other Morrow personnel, but the War Department

is looking to him as the manager. It is not possible to have the two bosses on any job.

Very truly yours,

/s/ JAY L. TAYLOR,

Major, A.U.S. Liaison Officer,
Fiscal Division.

cc Mr. Goodwin
Mr. McCausland
American National Bank,
San Bernardino, California.

[Endorsed]: Filed April 4, 1947. [40]

In the District Court of the United States, Southern
District of California, Central Division

No. 4428-BH

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HOWARD B. MORROW,

Defendant.

MEMORANDUM AGREEMENT

The United States sues as the assignee of a guaranty executed by the defendant in the amount of \$100,000.00. More than \$100,000.00 remains due and unpaid on the primary obligation.

The case presents two issues: First, when a contract of guaranty contains a recital to the effect

that it secures a note of even date therewith, is the guarantor exonerated because the note was actually executed five days later, even though the note and guaranty were executed as part of the same transaction? Second, if the defendant-guarantor were originally bound, did he consent to a modification in the security, or was he exonerated when the obligee contracted not to foreclose on the mortgage securing the note until the termination of a certain joint-adventure?

In November, 1942, the Morrow Aircraft Corp. (hereinafter called the Corporation), of which the defendant was the president and majority stockholder, needed money to carry on its business in the construction of airplane parts for the national defense. On November 13, 1942, the defendant entered into a contract of guaranty, agreeing to pay the American National Bank of San Bernardino (hereinafter called the Bank) or order, on demand, the indebtedness of the Corporation "evidenced by a promissory note of even date herewith, in the face amount of \$225,000.00," the defendant's liability not to exceed \$100,000.00. The loan was actually made sometime after November 18, 1942, and the promissory note of the Corporation was issued bearing that date. The note was secured by a chattel mortgage on almost all of the property of the Corporation, as well as all of the defendant's stock therein.

Later in November, 1942, the government placed one Guy L. Goodwin in the plant as manager. In January, 1943, the Corporation began negotiations

with one Ziebarth to enter into a joint-adventure for carrying out its contracts. Ziebarth would not close the transaction until the Bank, among other things, had agreed not to foreclose on its mortgage during the existence of the joint-adventure, except with his consent. On January 10, 1943, the defendant, in his capacity as president of the Corporation, signed a letter from him to the Bank, wherein Ziebarth's conditions were stated. This letter was prepared by the Bank preparatory to its execution of the waiver Ziebarth was demanding. On January 19, 1943, the Bank executed a "Consent, Waiver, and Agreement of Indemnity," and the joint-adventure was entered into on the same day. The joint-adventure was terminated in January, 1946. The note has been assigned by the Bank to the United States, and the unpaid balance exceeds \$100,000.00.

A guaranty cannot exist if there is nothing to guarantee. *Kilbride v. Moss*, 113 Cal. 432, 45 Pac. 812. The defendant contends that since the note purportedly secured by the guaranty did not exist at the time of the execution of the guaranty, the guaranty is of no effect. A guaranty is a contract to answer for the debt of another, and if the debt does not exist, the guaranty cannot. [42]

But defendant admits that the guaranty was executed as part of the same transaction with the note. The mere fact that the guaranty was executed before the note will not make it void. In *Howland v. Aitch*, 38 Cal. 133, 136, the court stated that:

"It is a matter of no moment at what time, relative to each other, the contracts may have

been made and delivered, and the consideration may have passed, if they together constituted one transaction."

The language was applied in *Drovers' National Bank v. Browne*, 88 Cal. App. 716, 264 Pac. 265, 268, where the defendant had executed a guaranty before the issuance of the note secured, under circumstances very similar to those now under consideration, and the court said that: "Defendant cannot complain that the guaranty was executed 5 days before the renewal of the note maturing November 14, 1921."

The guaranty refers to a note "of even date." The words quoted were not intended to limit the defendant's liability to a note of even date, but merely to describe a note which was to be executed as a part of the transaction. The descriptive words chosen were clearly identified by the defendant's own testimony. *Snow v. Holmes*, 71 Cal. 142, 11 Pac. 856, 858. Therefore, the primary obligation upon which the guaranty could stand did exist, and the defendant was bound upon his guaranty at the time the note was executed.

It remains to be decided whether the defendant was exonerated because of the modification in the terms of the security held by the bank. A surety or guarantor is exonerated where the original obligation is altered in any respect, or the remedies or rights of the creditor against the principal in respect thereto are in any way impaired or suspended, unless the surety knows of the change and consents thereto. *Braun v. Crew*, 183 Cal. 728, 192 Pac. 531,

534. The defendant had knowledge of the Ziebarth deal, so the sole issue remaining is whether he, as guarantor, consented to the Bank's waiver.

Consent may be express or implied from the conduct of the surety, but the burden of proof is on the plaintiff to show consent [43] was granted, *Tuohy v. Woods*, 122 Cal. 665, 667, 55 Pac. 683, 684; and the mere fact that the surety remained silent after he had knowledge of the alteration is insufficient in itself to preclude him from claiming the release. *Pacific National Agricultural Credit Corp. v. Hagerman*, 39 N.M. 549, 51 P. 2d 857, 101 A.L.R. 1301. But when his silence is coupled with affirmative action which would lead the obligee reasonably to believe consent had been given, he is under a duty to obligee to disavow his liability promptly. *Christie v. Commercial Casualty Ins. Co.*, 6 Cal. App. 2d 710, 45 P. 2d 263, 267.

In *Hallock v. Yankey*, 102 Wis. 41, 78 N.W. 156, the defendant, as treasurer of the company whose note he had guaranteed, negotiated several extensions of the note. He was held liable on the guaranty despite the lack of express consent to the change in terms of the original obligation because of his affirmative action. The court said:

“Of course, the obligations of a surety are strictissimi juris. He may have knowledge that an extension has been granted to his principal, and the law does not impose on him the duty to speak. 2 Brandt, Sur. Sec. 345. But the surety is bound by the rules of good faith and fair dealing, as well as other men. If he, as agent

for the principal debtor, requests and obtains an extension of time, and pays the consideration for such extension, and nothing is said as to his liability as surety, it is very obvious that the creditor would naturally and almost inevitably conclude that he consents to the extension individually, as well as in his capacity as agent." Cf. *Mundy v. Stevens*, 3 Cir., 61 Fed. 77, 85.

Except that the defendant here was president of the corporation, instead of the treasurer, the cases are almost identical, and the decisions should be the same. The defendant's conduct was such that no reasonable man could but believe that he had consented to the modification in his personal capacity.

It is difficult to conceive a president of a corporation, owning a controlling interest therein, consenting to a present waiver of the right to foreclose by the holder of the note and in [44] the same breath claiming as an individual he did not consent. Whatever was to the interest of the corporation was certainly to the interest of the defendant. By consenting to the terms of the joint-adventure under his letter of January 10, 1943, he was either unfaithful to the corporation of which he was president or was doing that which he felt furthered the interest of the corporation. His interests and the corporation's were identical. I feel that the entire picture reflects an implied consent on the part of the defendant.

I further feel, that notwithstanding defendant's

claim to the contrary, he was at all times a free agent and that he was not a rubber stamp, as he now claims. He is and was a business man of wide experience, and like many other business men, he sought to enter into defense work. His venture evidently was a failure. He took the risk and lost, and now seeks to avoid his just obligations by claiming ignorance of the consequence of his own act.

The defendant's contention that consent may be implied only where there is an element of estoppel is not borne out by the cases. Consent is none the less real because it is implied, and no element of estoppel is necessary when consent is given. There was nothing to indicate to the Bank that the alteration in security was not made with his consent, and the defendant's own action in participating in the negotiations preliminary to the alteration by signing the letter of January 10th, without objection or reference to his status as guarantor, strongly indicated that it was given. It is only equitable that he be bound by the terms of the original contract. *Union Oil Co. v. Mercantile Refining Co.*, 8 Cal. App. 768, 97 Pac. 919.

The plaintiff is entitled to judgment and counsel for the plaintiff is directed to submit forthwith proposed findings and judgment in accordance with this memorandum opinion.

Dated: This 8th day of May, 1947.

/s/ BEN HARRISON,
Judge.

[Endorsed]: Filed May 12, 1947. [45]

[Title of District Court and Cause.]

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

On January 2, 1947, the above cause came on for trial and, a jury having been waived, the matter was heard by the Court. Then came James M. Carter, United States Attorney; Ronald Walker and Charles H. Veale, Assistant United States Attorneys, by Charles H. Veale on behalf of the plaintiff, and came the defendant in person and by his Attorney, Jesse W. Curtis, Jr. Evidence both oral and documentary having been heard and introduced, cause was submitted. Thereafter, upon stipulation of counsel, an order was made and entered reopening said cause for further hearing. Whereupon, on April 4, 1947, came the parties by their respective counsel and evidence and argument of counsel having been heard and considered, the Court now makes its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

I.

The defendant is a resident of the Southern District of California and within the jurisdiction of this Court. [46]

II.

On November 18, 1942, the American National Bank of San Bernardino, California, loaned to Morrow Aircraft Corporation the sum of \$225,000, evidenced by promissory note of the Morrow Air-

craft Corporation dated November 18, 1942, in the principal sum of \$225,000.

III.

On November 13, 1942, the defendant herein made, executed and delivered to the American National Bank of San Bernardino his guaranty in writing in the sum of \$100,000 for the purpose of guaranteeing in said sum of \$100,000 the payment of said note of \$225,000.

IV.

On November 29, 1944, the American National Bank of San Bernardino made, executed and delivered to the United States of America an assignment wherein and whereby, among other things, plaintiff became the holder and owner of said guaranty.

V.

At the time of filing of this action, and at all times since, there remained due, owing and unpaid upon said \$225,000 note a sum of money in excess of \$100,000.

VI.

The \$225,000 loan to the corporation was secured by a chattel mortgage on all furniture, fixtures, machinery and equipment, tools, tooling, and accessories owned or to be acquired by the corporation for use in connection with the operation of the manufacturing plant belonging to it.

VII.

In November of 1942, the Government placed one Guy L. Goodwin in the corporation's plant as mana-

ger. Thereafter, in the early part of January, 1943, the corporation began negotiations with one Fritz Ziebarth to enter into a joint adventure for carrying out Morrow Aircraft Corporation's contracts. Ziebarth would not close the transaction until the American National Bank of San Bernardino, among other things, had agreed not to foreclose on its chattel mortgage during the existence of the joint adventure, except with his [47] consent. On January 10, 1943, the defendant in his capacity as president of the corporation signed a letter addressed to the American National Bank of San Bernardino, in which letter the conditions imposed by Ziebarth were stated. On January 19, 1943, the American National Bank of San Bernardino executed a document entitled "Consent, Waiver and Agreement of Indemnity" and the joint adventure was entered into on the same day. The joint adventure was terminated in January, 1946.

VIII.

The defendant owned the majority of stock in the corporation and actively engaged in the conduct of its business up to Dec. 2, 1942. After the said Guy L. Goodwin became manager of the plant, the defendant continued to participate in the corporation's affairs.

IX.

The defendant had knowledge in the month of November, 1942, of negotiations which were then being carried on by and on behalf of the corporation for the purpose of borrowing the sum of \$225,000.00

from the American National Bank of San Bernardino. He knew that out of said sum of money there was to be paid a then existing obligation of \$100,000 and that he was then obligated as a guarantor of said \$100,000. He also knew that one of the requisites of the new loan was the execution of the guaranty up to \$100,000 hereinabove mentioned. The guaranty was dated November 15, 1942, and the note for \$225,000 was dated November 18, 1942, the loan being consummated some time after November 18, 1942, and each had reference to and constituted one transaction.

X.

Nine days prior to the execution by the bank of the "Consent, Waiver and Agreement of Indemnity," the defendant had knowledge of the proposed joint adventure and of its terms and requirements, and on January 10, 1943, in his capacity as president of the corporation, he signed a letter directed to the bank, wherein said requirements and terms were stated.

XI.

On May 4, 1945, plaintiff demanded of defendant the payment of the sum of \$100,000, in accordance with the terms of the guaranty. Plaintiff [48] has failed and refused to pay the same or any part thereof, and there is now due and owing from defendant to plaintiff the sum of \$100,000, with interest at the rate of 6% per annum from and after said date.

CONCLUSIONS OF LAW

I.

The defendant consented to the execution by the American National Bank of San Bernardino on the 19th day of January, 1943, of the document entitled "Consent, Waiver and Agreement of Indemnity" and is not entitled to judgment under his Separate and Second Defense.

II.

Notwithstanding the fact that the guaranty executed by the defendant bore date November 13, 1942, and the primary obligation described in the guaranty as a note of "even date herewith," but bearing date November 18, 1942, the execution and delivery of the respective documents were a part of one and the same transaction and constitute consideration for the execution of the guaranty, upon which the plaintiff is entitled to recover.

III.

Plaintiff is entitled to judgment against the defendant, Howard B. Morrow, in the sum of \$100,000, together with interest at the rate of 6% per annum thereon from May 4, 1945, and for costs and disbursements in this action.

Let judgment be entered accordingly.

Dated this 3rd day of June, 1947.

/s/ BEN HARRISON,

United States District Judge.

[Endorsed]: Filed June 3, 1947. [49]

In the District Court of the United States in and
for the Southern District of California, Central
Division

No. 4428-BH Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HOWARD B. MORROW,

Defendant.

JUDGMENT

On January 2, 1947, the above cause came on for trial and, a jury having been waived, the matter was heard by the Court. Then came James M. Carter, United States Attorney, Ronald Walker and Charles H. Veale, Assistant United States Attorneys, by Charles H. Veale on behalf of the plaintiff, and came the defendant in person and by his Attorney, Jesse W. Curtis, Jr. Evidence both oral and documentary having been heard and introduced, cause was submitted. Thereafter, upon stipulation of counsel, an order was made and entered re-opening said cause for further hearing. Whereupon, on April 4, 1947, came the parties by their respective counsel and evidence and argument of counsel having been heard and considered, and the Court having made its Findings of Fact and Conclusions of Law,

It Is Ordered, Adjudged and Decreed that plaintiff, United States of America, recover of and from defendant, Howard B. Morrow, the sum of

\$100,000, together with interest at the rate of 6% per annum from and after May 4, 1945, and plaintiff's costs taxed herein amounting to \$29.23.

Dated this 3 day of June, 1947.

BEN HARRISON,
United States District Judge.

[Endorsed]: Judgment entered, docketed June 3, 1947, Book 43, Page 452. [50]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the United States of America, Plaintiff Herein,
and James M. Carter, United States Attorney,
Ronald Walker, Assistant United States Attorney,
and Charles H. Veale, Assistant United States Attorney, Its Attorneys:

Notice is hereby given that Howard B. Morrow, the defendant above named, hereby appeals to the Circuit Court of Appeals for the 9th District from a final judgment entered in the above entitled matter on June 3, 1947.

Dated: August 27, 1947.

CURTIS & CURTIS,
By: JESSE W. CURTIS, JR.,
Attorneys for Defendant.

[Endorsed]: Filed and mailed copy to Charles H. Veale, attorney for plaintiff, Aug. 29, 1947. [51]

[Title of District Court and Cause.]

AFFIDAVIT OF
JESSE W. CURTIS, JR.

Jesse W. Curtis, Jr., being first duly sworn, deposes and says:

That he is now and has at all times since the commencement of the above entitled action, been an attorney at law duly licensed to practice before the above-entitled court, and has at all times, and does now represent the defendant, Howard B. Morrow.

That affiant, on behalf on his client, has heretofore submitted an offer of compromise of the judgment heretofore rendered herein, which offer of compromise is now in the hands of the Attorney General's office in Washington, D. C., for consideration; that the Assistant United States Attorney there to which this case has been assigned is one A. B. Holman who is away on vacation and will not return for several weeks; that it is to the best interest of all parties hereto that any further proceedings herein be delayed until some determination has been made with respect to [52] the offer of compromise.

JESSE W. CURTIS, JR.

Subscribed and sworn to before me this 27th day of August, 1947.

[Seal] /s/ RUTH SHILLING,

Notary Public in and for said
County and State.

[Endorsed]: Filed Aug. 29, 1947. [53]

[Title of District Court and Cause.]

MOTION FOR ORDER EXTENDING TIME
TO FILE RECORD AND DOCKET
CAUSE

Comes now Howard B. Morrow, the defendant in the above entitled action, having filed his Notice of Appeal and cost bond in the manner and within the time required by law, and moves the above entitled court for an extension of time, to wit, 90 days from August 28, 1947, to date upon which Notice of Appeal was filed, to file record and docket cause; that the foregoing motion is based upon the affidavit of Jesse W. Curtis, Jr., attorney for said Howard B. Morrow, and upon the records, papers and files in this case on file herein.

Dated: August 28, 1947.

CURTIS & CURTIS,
By: JESSE W. CURTIS, JR.,
Attorneys for Defendant,
Howard B. Morrow.

So stipulated.

/s/ CHARLES H. VEALE,
Of Counsel for Plaintiff.

It is so ordered.

Date: Aug. 28, 1947.

/s/ JACOB WEINBERGER,
Judge.

[Endorsed]: Filed Aug. 29, 1947. [54]

[Title of District Court and Cause.]

AFFIDAVIT FOR
ENLARGEMENT OF TIME

State of California,
County of San Bernardino—ss.

Jesse W. Curtis, Jr., being first duly sworn,
deposes and says:

That he is now and has at all times since the commencement of the above entitled action, been an attorney at law, duly licensed to practice before the District Court of the United States, in and for the Southern District of California, Central Division, and has at all times here mentioned, and does now, represent the defendant, Howard B. Morrow, in the above entitled cause;

That affiant, on behalf of his client, has heretofore submitted an offer of compromise of the judgment heretofore rendered herein, which offer of compromise is now in the hands of the Attorney General's office, in Washington, for consideration; that the cause of action to which the complaint herein relates [55] pertains to an alleged guarantee of the defendant upon a Regulation V loan made to a war contractor; that affiant is informed, and believes, and therefore alleges, that the War Department is making an extensive investigation for the purpose of advising the Attorney General's office as to whether or not the offer of compromise heretofore referred to should be accepted; that affiant further alleges, on information and belief, that the investi-

gation has not yet been completed, and no action has as yet been taken by the Attorney General's office upon defendant's offer of compromise;

That Notice of Appeal was filed herein on August 27, 1947; that thereafter the above entitled court extended the time to file record and docket cause for a period of 90 days from August 28, 1947; that said extension expires November 27, 1947; that it is to the best interest of the parties hereto that the time to file record and docket cause be further enlarged for a period of 90 days from and after November 25, 1947.

/s/ JESSE W. CURTIS, JR.

Subscribed and sworn to before me this 25th day of November, 1947.

[Seal] /s/ MARK WATTERSON,

Notary Public in and for said
County and State.

[Endorsed]: Filed Nov. 28, 1947. [56]

[Title of District Court and Cause.]

CONCISE STATEMENT OF POINTS ON
WHICH APPELLANT INTENDS TO
RELY ON APPEAL

The above named defendant, and appellant, Howard B. Morrow, pursuant to Rule 75 (d) files concurrently with Designation of Contents of Record on Appeal this, his Concise Statement of Points on which he intends to rely on appeal as follows:

1. The District Court erred in overruling the motion interposed by the defendant and appellant to dismiss the original complaint filed in the cause for failure to state a claim.
2. The District Court erred in failing to make a finding on a material fact, viz., whether the defendant and appellant consented to a modification in the security.
3. The Conclusion of Law that the defendant and appellant consented to the execution by the American National Bank of San Bernardino on the 19th day of January, 1943, of the document entitled "Consent, Waiver and Agreement of Indemnity" is contrary to the evidence and the law.
4. The Findings of Fact and Conclusions of Law are [59] insufficient to support the judgment.
5. The evidence is insufficient to support the judgment.
6. The judgment is against the law.

CURTIS & CURTIS,

By /s/ JESSE W. CURTIS, JR.,

Attorneys for Defendant
and Appellant.

Received copy of the within Statement of Points
this 15th day of April, 1948.

JAMES M. CARTER,

U. S. Atty.,

By GERTRUDE M. JOHNSON,

Attorney for Plaintiff.

[Endorsed]: Filed April 15, 1948. [60]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

The above named defendant, Howard B. Morrow, having heretofore filed his Notice of Appeal to the Circuit Court of Appeals for the Ninth District from a final judgment entered in the above entitled matter on June 3, 1947, and the time for the filing of record and docket cause having been extended to May 20, 1948, hereby makes the following Designation of Contents of Record on Appeal pursuant to Rule 75 (a) :

1. Plaintiff's Complaint on Guaranty with Exhibit "I" attached thereto.
2. Defendant's Motion to Dismiss for Failure to State a Claim with Affidavit of Jesse W. Curtis, Jr., attached thereto as Exhibit "A" and Consent, Waiver and Agreement of Indemnity attached to said affidavit as Exhibit "A."
3. Order denying defendant's Motion to Dismiss.
4. Defendant's Answer to Complaint with Exhibits "A" and "B" attached thereto. [61]
5. Reporter's Transcript of Proceedings, dated January 2, 1947.
6. Plaintiff's Exhibit One.
7. Notice by Clerk of District Court, dated March 4, 1947, that cause is set for further trial.

8. Reporter's Transcript of further proceedings, dated April 4, 1947.
9. Defendant's Exhibit "A."
10. Memorandum Opinion.
11. Findings of Fact and Conclusions of Law.
12. Judgment.
13. Notice of Appeal, dated August 27, 1947.

CURTIS & CURTIS,
By /s/ JESSE W. CURTIS, JR.,
Attorneys for Defendant
and Appellant.

Received copy of the within Designation of Contents this 15th day of April, 1948.

JAMES M. CARTER,
United States Attorney.
By /s/ GERTRUDE M. JOHNSON,
Attorney for Pltf.

[Endorsed]: Filed April 15, 1948. [62]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 62, inclusive, contain full, true and correct copies of Complaint on Guaranty; Motion to Dismiss for Failure to State a Claim; Affidavit of Jesse W. Curtis, Jr.; Minute Order Entered February 4, 1946; Answer; Stipula-

tion; Copy of Notice of Setting for Further Trial; Plaintiff's Exhibit 1; Defendant's Exhibit A; Memorandum Opinion; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Affidavits, Motions and Orders Extending Time to File Record and Docket Appeal; Statement of Points on Which Appellant Intends to Rely on Appeal and Designation of Contents of Record on Appeal which, together with copy of reporter's transcript of proceedings on January 2, 1947, and April 4, 1947, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$15.80 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 5th day of May, A.D., 1948.

[Seal] EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy.

In the District Court of the United States for the
Southern District of California, Central Division

NO. 4428-BH-Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HOWARD B. MORROW,

Defendant.

Honorable Ben Harrison, Judge presiding.

REPORTER'S TRANSCRIPT
OF PROCEEDINGS

Appearances:

For the Plaintiff: Charles Veale, Esquire, Asst.
U. S. Attorney.

For the Defendant: Jesse W. Curtis, Equire.

Los Angeles, California,

Thursday, January 2, 1947, 10:00 A.M.

(Case called by the clerk.)

Mr. Veale: The plaintiff is ready, your Honor.

Mr. Curtis: The defendant is ready.

The Court: Gentlemen, in looking over the file I wonder if the wrong guarantee has not been attached to the copy I have. It differs a little bit from the original.

Mr. Veale: I was not aware of that, your Honor.

The Court: The original is all right. The guarantee that is attached to the copy for my file is signed "Frank A. Morrow". The complaint itself, however, has the one signed by the defendant.

Mr. Curtis: This is a joint and several guarantee—that is, each guarantor signed a separate instrument. This is a suit merely on the guarantee of Howard Morrow.

The Court: What facts are stipulated to, gentlemen?

Mr. Veale: I was about to state, your Honor, it is stipulated that the defendant Howard B. Morrow, executed the guarantee sued upon and that at the time of its execution or at the time of the filing of this action and at this time, there is a balance due upon the primary obligation in excess of \$100,000. The guarantee here is limited to \$100,000.

I think it can also be stipulated to that the joint adventure between the Morrow Aircraft Corporation and Ziebarth, [3*] which is mentioned in defendant's answer, was executed in the form pleaded and upon the date shown by the pleadings.

The Court: There is no question as to the note and guarantee being duly assigned to the United States.

Mr. Curtis: No question about that.

The Court: And, as I understand, you admit all the allegations of the complaint except as it is varied by your two special defenses.

Mr. Curtis: Well, with this exception, your Honor——

The Court: In other words, you claim there was an alteration in the collateral or security?

Mr. Curtis: Yes.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

The Court: That relieves the guarantor. And I believe you also raise a question as to the time of execution of the two instruments?

Mr. Curtis: Yes, we do. We have two separate defenses pleaded. One of them relates to the existence of the joint-adventure agreement. In other words, the bank had agreed that there would be no action upon, no attempt to foreclose during the existence of the joint-adventure agreement. At the time this action was brought the joint adventure agreement was still in effect and we have pleaded an answer based upon that fact.

Since that time the joint adventure has been dissolved and is no longer in effect. So, I take it, that [4] answer has no particular bearing. However, the other answer which—the other special defense and upon which we are relying was the fact that there was an alteration in the underlying agreement without the consent of the guarantor and for that reason he is exonerated.

Now, there is one other point, another matter that we wish to raise. We raised it in our motion to dismiss and we would like to raise it again, and that is the fact that the guarantee as pleaded and as the evidence will show, refers to a note of even date. The guarantee was dated the 13th of November. There is no note in existence of even date of the guarantee.

Our thought was there that inasmuch as the liability of a guarantor must be strictly construed that there is no fundamental underlying obligation to which the guarantee refers.

The note which the plaintiff here will produce is a note dated the 18th day of November, which, obviously, is not of even date and therefore the proof will be at variance with the terms of the guarantee.

The Court: You say the note is dated the 18th?

Mr. Curtis: 18th of November.

The Court: Woudn't it then be a question of fact as to identity?

Mr. Curtis: No. Our defenses are largely technical [5] based upon the contention that there should have been an action, an equitable action to perform the instrument or guarantee. We are not going to raise the contention that there was not the lack of identity or that there was an actual——

The Court: Of course, it will not be a question of fact as to whether or not these instruments were executed simultaneously.

Mr. Curtis: It might be, although I believe the facts will show that they were not executed simultaneously.

The Court: I mean as one transaction.

Mr. Curtis: They were executed as one transaction.

The Court: No question about that.

Mr. Curtis: No.

Mr. Veale: That would be our contention as to that point, that they were executed as one transaction and we believe the facts will show that.

Mr. Curtis: I believe that is true, your Honor. My objection in that respect is only as a technical one based upon the contention that the note, if it

does not conform to the guarantee should be reformed. This is an action of law and the plaintiff must rely upon the guarantee and its terms. The guarantee refers to a note which is not—does not conform to the note which will be presented here.

The Court: Can it be stipulated by the parties that the note and the guarantee were executed as a part of one [6] transaction.

Mr. Curtis: Yes, your Honor, I will stipulate to that.

Mr. Veale: So stipulated.

The Court: Is there any question that the two documents were executed on two different days? In other words, sometimes they are executed on the same day but bear different dates.

Mr. Curtis: I don't know whether there will be any possibility of establishing with any degree of certainty that fact, but they were executed, I believe, in different places and I believe the evidence will show that, and I think the evidence might even establish that they were signed on different days, but——

Mr. Veale: I think that is quite right, your Honor. The documents were executed as a culmination of considerable negotiation that had taken place prior, long prior to the execution of this note or the guarantee contract, and represent an increase in liability of the Morrow Aircraft Company from approximately \$100,000 to \$225,000. But, as Mr. Curtis has said, those negotiations were carried on at several different places—down at the bank in San Bernardino, the Federal Reserve Bank in Los

Angeles, and probably some at the Morrow Aircraft place of business.

Mr. Curtis: And the principals who were involved were widely scattered over the country.

Mr. Veale: I think that is true. [7]

Mr. Curtis: These papers were signed wherever they could be found. I do not know that we are in position to establish whether Howard Morrow signed that note in San Bernardino or New York City. I don't know that that particular fact is important.

The Court: Have you any evidence as to where these two different documents were executed?

Mr. Veale: I just asked Mr. McCauslin of the Federal Reserve Bank, and he tells me that he does not know.

The Court: Have you any evidence to offer as to the identity of the note as tied into the guarantee?

Mr. Veale: Yes, yes. We would offer testimony by Mr. McCauslin who was thoroughly familiar with all the negotiations leading up to the transaction as well as the transaction itself.

The Court: Then let us proceed with whatever evidence you have.

Mr. Curtis: At this time do you want to complete our stipulation with respect to the matters set forth in the defense? In other words, we have pleaded certain documents, one, the execution of the joint-adventure agreement.

The Court: I think he stated that there was.

Mr. Curtis: He stated that but he did not state the chattel mortgage.

Mr. Veale: I just neglected to do it. I meant to do it. [8]

The Court: Now, just a moment. The execution of the chattel mortgage is designated as Exhibit A and the consent waiver and agreement of indemnity is marked Exhibit B.

Mr. Curtis: Yes.

The Court: Pleased in the answer, and are deemed admitted?

Mr. Curtis: Deemed admitted, yes.

There is one other thing, too, your Honor. In the answer we have denied knowledge and consent on the part of this defendant to the modification that was pleaded at a time when the evidence with respect to that matter was somewhat uncertain. In preparing the case we have come to the conclusion that the knoweldge which the defendant received was in all probability and was in fact prior to the modification agreement.

The Court: In other words, you at this time are ready to stipulate that they had knowledge of and consented to the modification?

Mr. Curtis: No. We are willing to stipulate that he had knowledge of, but we are relying now upon the fact that he did not consent to it, never requested to consent to it and did not by any act consent to it.

The Court: That is the sole issue of fact.

Mr. Curtis: That is the sole issue of fact.

Mr. Veale: May it also be stipulated that this letter, [9] a photostat, is a copy of a letter signed

by Mr. Morrow with the exception of the handwriting on the lower part of the front page?

Mr. Curtis: Yes, I will stipulate to the letter.

Mr. Veale: In that case we offer this letter. That should probably be Government's Exhibit 2. I want to offer a copy of the guarantee as Government's Exhibit 1.

The Court: It is pleaded and admitted. Why encumber the record with it? Government's Exhibit 1 will be admitted.

(The document referred to was marked as Government's Exhibit 1, and was received in evidence.)

Mr. Veale: Mr. McCauslin, will you take the stand?

H. E. McCAUSLIN,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: H. E. McCauslin.

Direct Examination

By Mr. Veale:

Q. What is your business, Mr. McCauslin?

A. Head of the Credit Department of the Los Angeles Branch of the Federal Reserve Bank.

Q. How long have you been so engaged?

A. About 14 years. [10]

Q. Are you familiar with the various negotia-

(Testimony of H. E. McCauslin.)

tions and transactions involving the loaning of money to the Morrow Aircraft Company?

A. To a considerable extent, yes.

Q. Can you state the nature and amount of the original obligation of the Morrow Aircraft Company?

A. Before answering that, when you say "original obligation," do you mean the first loan that they made under this Regulation "B"?

Q. Yes. A. That was \$100,000.

Q. And do you recall when that was made?

A. Well, the application for that \$100,000 loan was made in July 1942.

Q. Do you recall who signed the application or who made the application?

A. Well, the application, naturally, would be made by what we call the financing institution, which in this case was the American National Bank of San Bernardino.

Q. You know Mr. Morrow, do you?

A. Yes.

Q. Do you know his brother as well, Frank Morrow? A. I have met him.

Q. Now, in the fall of 1942 did you carry on any negotiations with Mr. Morrow or with anyone of the Morrow [11] Aircraft Company?

A. Only indirectly. That would be the financing institution, the American National Bank of San Bernardino.

Q. I did not quite finish my question.

A. Pardon me.

(Testimony of H. E. McCauslin.)

Q. Did you carry on any such negotiations with the view of increasing that loan from \$100,000 to \$225,000? A. Yes.

Q. Now, in connection with those negotiations did you have occasion to meet and talk with Mr. Howard Morrow concerning it? A. Yes.

Q. Where?

A. In the office of the Federal Reserve Bank in Los Angeles.

Q. Did you also have occasion to go to the American National Bank in San Bernardino in connection with those negotiations?

A. I don't recall that I did in connection with those particular negotiations.

Q. Do you recall the execution of the guarantee upon suit is here filed?

A. Well, only to the extent that that came to us through the American National Bank of San Bernardino.

Q. Were you familiar with or did you have any—did [12] you give any instructions to the American National Bank or to the Morrow Aircraft Company with respect to those documents that were then being executed?

A. Well, I don't recall distinctly that we did.

Q. To refresh your memory, Mr. McCauslin, I show you Government's Exhibit 1, which is a letter dated January 10, 1943, and ask you if you made any suggestions or changes in the plans set forth in that letter? A. (No answer.)

(Testimony of H. E. McCauslin.)

Q. Did you offer any modification of that letter?

A. Well, I believe that we offered somewhat of a modification of this paragraph No. 5.

Q. Of course that letter had to do with the proposed joint adventure which was being entered into between the Morrow Aircraft Company and Ziebarth, did it not? A. Yes.

Q. Prior to that time had you talked with Mr. Howard Morrow concerning the necessity of having additional capital for them to operate on, or do you recall that?

A. I don't recall that particularly. Mr. Morrow, Howard Morrow, was in the back talking to the liaison officer, who made the contacts with the borrowers, and there was more or less general discussion about the need for additional funds to operate the business.

The Court: What do you know about Mr. Morrow's consenting [13] to the releasing of the properties covered by the chattel mortgage insofar as any conversations you had with Mr. Morrow or any correspondence you had with him?

A. Nothing so far as conversations. The only correspondence is the copy of a letter that was just introduced here in evidence. Beyond that I know nothing.

Q. (By Mr. Veale): Do you have any knowledge—did you have any knowledge, Mr. McCauslin, of when and where the \$225,000 note and the guarantee contract were in fact executed—when and where?

(Testimony of H. E. McCauslin.)

A. No, I do not, because those were executed, presumably, at the American National Bank in San Bernardino.

The Court: And you never saw them until there was a default, is that it?

The Witness: We were supplied with copies immediately.

Q. (By Mr. Veale): Well, it is true, is it not, Mr. McCauslin, that the Federal Reserve Bank required of the American National Bank——

The Court: What they required of the American National Bank would not be binding upon this defendant. There is only one issue here. Did he consent to the release of this security?

Mr. Veale: That is true, but my question was preliminary. I will put the question this way:

Q. The proposed \$250,000 loan, although being made by [14] the American National Bank to the Morrow Aircraft Company, was nevertheless under the supervision of the Federal Reserve Bank, was it not? A. Yes, sir.

Q. And the Federal Reserve Bank was familiar with all of the negotiations leading up to its execution? A. I believe so.

Q. Had Mr. Howard Morrow been a guarantor on the \$100,000 obligation prior to that time?

A. Yes, he was.

Q. Do you know whether or not the Federal Reserve Bank had insisted that he be a guarantor on the \$225,000 obligation up to \$100,000?

A. It did insist, yes, sir.

(Testimony of H. E. McCauslin.)

Mr. Veale: That is what I was trying to bring out, your Honor.

The Court: Insisted to the American National Bank?

The Witness: Yes; that was a condition of the loan.

Q. (By Mr. Veale): Do you recall having any conversation with Mr. Howard Morrow subsequent to the execution of the guarantee and up to the date when the joint enterprise was entered into?

A. Oh, I think there were several conversations but I don't recall what they were about.

The Court: Do you remember at any time of Mr. Howard [15] Morrow discussing with you this joint adventure and the necessity of obtaining a release of the chattel mortgage?

The Witness: Well, only to the extent that that came through us, your Honor, from the American National Bank—that letter that he wrote, and we consented, we authorized the bank to enter into the agreement with the joint adventure in response to his request.

Mr. Curtis: I submit, your Honor, the testimony of the witness is a conclusion, largely a legal conclusion.

The Court: It is just a question, gentlemen, whether the court should issue a subpoena for the proper officials of the American National Bank and brought in here because you have this situation. The American National Bank did not carry out the instructions—if they did not, then they should

(Testimony of H. E. McCauslin.)

be made a party to this action. If Mr. Morrow was not liable the American National Bank is liable for failure to carry out their instructions. I am trying to get the facts without the necessity of continuing this and causing you to make another trip and inconveniencing the officials of the bank. Apparently this man does not know anything about the transaction. All he knows is what he learned by hearsay.

Q. (By Mr. Veale): Did Mr. Watkins of the Federal Reserve Bank conduct any part of these negotiations, Mr. McCauslin?

A. Very few, if any.

Mr. Veale: I think that is all I have to ask of Mr. [16] McCauslin.

Cross-Examination

By Mr. Curtis:

Q. Mr. McCauslin, this was a loan made under the provisions of an Act of Congress which they referred to as Title D Loan, was it not?

A. Regulation B loan.

Q. And a loan of that kind was a loan negotiated in the original—in the first instance through a local bank by a, presumably, war contractor, wasn't it? That is the type of loan it was?

A. Correct.

Q. And then the war department was called upon to guarantee that loan to the extent of a certain per cent, in most instances 90 per cent, upon their certification that the corporation was

(Testimony of H. E. McCauslin.)

engaged in an essential war industry, isn't that right? A. Correct.

Q. War work? A. Yes.

Q. And your participation then was that of the agent of the War Department, their fiscal agent in arranging for the loan and caring for it and servicing it throughout its entire time, isn't that true?

A. Yes, sir. [17]

Q. Now, after this loan was—let us take the first \$100,000 loan which was negotiated. At that time Howard Morrow, this defendant, and the other officers of the corporation were in control of the corporation, were they not?

A. That is right.

Q. That is to the extent that they approached the American National Bank in San Bernardino and had conferences also with you and Mr. Watkins in Los Angeles with respect to that loan?

A. Well, they called on us. I think it was in connection with that original loan.

Q. From that time on isn't it a fact—well, strike that. In your office you had dealings with a liaison officer of whom you have spoken, who represented the War Department and who was to be the representative of that department in your office as the point of contact between the two organizations?

A. That is correct.

Q. And on that occasion it was a Colonel Taylor, was it not?

A. Major Taylor at that time.

Q. Major Taylor at that time. And isn't it a

(Testimony of H. E. McCauslin.)

fact that most of the conversations and most of the negotiations which pertained to the first \$100,000 loan as well as to the \$225,000 loan, were all held with Colonel Taylor?

A. Well, I think most of them were. [18]

Q. And that the knowledge which you and Mr. Watkins would have from your end of it would be largely information which you acquired from Colonel Taylor?

A. Not exactly correct. We sat in on conference in Mayor Taylor's office on one or two occasions.

Q. But Major Taylor was the moving force in these negotiations? A. That is correct.

Q. He was the one who asked the questions and gave the answers? A. That is right.

Q. And the bank in most instances, that is, the Federal Reserve Bank, carried out the wishes of the War Department with respect to whatever their instructions might have been?

A. That is correct.

Q. Of course the local American National Bank in this instance was acting as a separate and distinct banking institution, carrying on their normal banking practices with a potential borrower?

A. That is right, yes.

Q. And your participation was merely one of acting as the agent for a guarantor?

A. That is right.

Q. Now, as these negotiations developed there were numerous papers and instruments prepared, were there not? [19] A. Yes, sir.

(Testimony of H. E. McCauslin.)

Q. And isn't it a fact that practically all of these papers, as negotiations progressed, were prepared either in your office—or strike that. Were prepared probably by the American National Bank and reviewed by you before they were signed?

A. In most cases, yes.

Q. And in some instances the documents were prepared by you in your office, were they not?

A. I don't recall any document prepared in our office.

Q. Well, may I refer to Government's Exhibit 1. I would like to have you refer to Government's Exhibit 1 and tell me if by examining it you can tell me who prepared that letter?

A. I haven't the slightest idea.

Q. You haven't any idea who prepared it?

A. No, sir.

Q. Do you know whether or not it was prepared in your office?

A. Well, I don't think it was prepared in our office.

Q. There are no initials on it? A. No.

Q. I will show you what I think Counsel will stipulate is the original of the photostat, marked Government's Exhibit 1, and ask you if by examining this letter you can tell [20] whether or not it is a letter prepared in your office.

A. I would say that it was not prepared in our office.

Q. Now, this was later modified, you say, by a subsequent letter.

(Testimony of H. E. McCauslin.)

A. Part of Paragraph 5 was stricken out.

Q. After the \$225,000 loan was made—by the way, during that negotiation do you recall whether you took any part in it at all?

A. Possibly so. I do not recall the extent.

Q. Did you have any dealings with a Guy Goodwin?

A. Yes, sir.

Q. On behalf of the corporation?

A. Yes, sir.

Q. In that respect?

A. Yes, I did.

Q. Now, you knew Guy Goodwin, did you not?

A. Yes, I did.

Q. And at that particular time he was acting as the manager of the Morrow Aircraft Corporation, was he not?

A. I don't recall at which time he was acting as manager other than he was acting, I believe, as manager just prior to the inception of the joint adventure, which was in January 1943.

Q. Well, now, he was acting as manager when this loan was executed, when the note was executed, was he not? [21]

A. I could not answer that definitely, yes.

Q. You do not know when he was there?

A. No, sir.

Q. You don't know in negotiating the loan whether you dealt with Guy Goodwin or Howard Morrow or whether he had any participation at all in those negotiations?

A. I do not recall distinctly, no.

Mr. Curtis: No further questions.

Mr. Veale: That is all. I will ask Mr. Morrow to take the stand under the rule.

HOWARD B. MORROW,

called as a witness under the Rule, being first duly sworn, was examined and testified in behalf of the plaintiff, as follows:

The Clerk: State your name.

The Witness: Howard B. Morrow.

Direct Examination

By Mr. Veale:

Q. Mr. Morrow, you were actively engaged with the Morrow Aircraft Company during all of 1942 and part of 1943, were you not? A. No.

Q. What part of it were you not engaged?

A. There was a part of late 1942 and early 1943 when I was not actively engaged. [22]

Q. Well, can you give us the dates?

A. Well, I can give you the approximate dates.

Q. What were the approximate dates?

A. I would say the last, probably the last week, or possibly the last two weeks of 1942—no, it would be more than that. Probably the last three weeks in 1942 and the first—at least the first three weeks in 1943.

Q. You knew Mr. Ziebarth, did you not?

A. Yes, sir.

Q. How long had you known him?

A. At what time?

Q. Well, how long have you known him at this time?

(Testimony of Howard B. Morrow.)

A. I met Mr. Ziebarth as nearly as I can recall, about, some time in December of 1942.

Q. Do you have any knowledge of what his business was at that time? A. Yes.

Q. Did you participate in any negotiations where in Mr. Ziebarth and the Morrow Aircraft Company were to become engaged in a joint adventure?

A. Only casually. I only—well, I won't volunteer any information unless you ask me.

The Court: What did you have to do with the arrangements that were had with the American National Bank for the release of properties under the chattel mortgage? [23]

The Witness: I had nothing to do with it.

The Court: Nothing whatsoever?

The Witness: None.

The Court: Who handled that?

The Witness: So far as I know, Guy Goodwin.

The Court: And who is he?

The Witness: Guy Goodwin is a man who was nominated by the War Department to act as manager of Morrow Aircraft Corporation in the latter part of 1942.

Q. (By Mr. Veale): You had had considerable dealings with the American National Bank prior to that time, had you not?

A. That is correct.

Q. And you were still dealing with them at the

(Testimony of Howard B. Morrow.)

time you signed that letter dated January 10, were you not?

A. I did not write that letter.

The Court: You signed the letter, didn't you?

The Witness: I did.

The Court: You knew the contents of it?

The Witness: Yes.

The Court: And you knew what was proposed to be done, didn't you, in order to obtain additional financing?

The Witness: In a casual way.

The Court: You were interested in the business?

The Witness: May I say this, that Mr. Goodwin took over the business and he ran it and I had little or nothing to say [24] about it. He handled the entire business. He handed papers to me to sign and told me to sign them and I did.

The Court: Did you own any interest in the Morrow Aircraft Company?

The Witness: I did. I owned the majority interest in the corporation.

The Court: And you didn't know what was going on?

The Witness: I did not say I didn't know what was going on. I said I did what I was told to do.

The Court: But you knew what was going on, didn't you?

The Witness: Yes.

The Court: And you knew about this other man coming in there and obtaining an interest, didn't you?

(Testimony of Howard B. Morrow.)

Mr. Curtis: If your Honor please, I do not like to interrupt, but there is a story which I would like to bring out on cross-examination or upon my examination, which will clear all this up. I think there is a misunderstanding in the Court's mind and a misunderstanding in Mr. Veale's mind as to the history back of this. I think I can in a few minutes tell the story or have Mr. Morrow tell the story as to what happened.

Mr. Veale: I think I know. I do not want to encumber this record with that story.

Mr. Curtis: I think it is very vital to know what took place in order to determine—— [25]

The Court: Just a moment, counsel. You will have an opportunity to question the witness.

Mr. Curtis: Thank you, your Honor.

The Court: You will have an opportunity to ask all the questions you want.

You knew the conditions under which Mr. Ziebarth was coming in and putting in some money, didn't you?

The Witness: Yes, I did.

The Court: And you knew it was going to be necessary to obtain an extension on that chattel mortgage, didn't you, in order to have him become interested?

The Witness: I did not know it until this letter was handed to me to sign.

The Court: Well, you knew it then?

The Witness: And I did not request it.

The Court: You knew it?

The Witness: Yes.

(Testimony of Howard B. Morrow.)

The Court: How many guarantees had you executed? Is this the second guarantee or the first one?

The Witness: Second.

The Court: And the second was for \$100,000?

The Witness: Well, they were one and the same guarantee as I understand it. I merely transferred the first guarantee on the first \$100,000 to the second \$100,000.

The Court: I am trying to get the picture. We have been [26] talking about a first loan on \$100,000 and another one at \$225,000.

The Witness: Well, as I understand it, the procedure was to pay off the first loan by borrowing more money so the \$225,000 immediately cancelled the first one.

The Court: And gave you \$125,000 additional working capital?

The Witness: Yes. So a new guarantee had to be drawn up to cover the second loan as I understand it?

The Court: And that is what you understood when you executed the second guarantee.

The Witness: That is correct.

The Court: That is all.

Mr. Veale: No further questions.

Cross-Examination

By Mr. Curtis:

Q. Mr. Morrow, in the fall, let us say in October, 1942, you and the other officers of the Morrow Aircraft Company were in active control?

A. That is correct.

(Testimony of Howard B. Morrow.)

Q. Of the Morrow Aircraft Corporation?

A. Yes, sir.

Q. Now, subsequent to that Mr. Guy Goodwin became the manager. Can you tell us approximately when that was?

A. Approximately October. [27]

Q. Mr. Goodwin then came to Rialto to assume his position prior to the execution of this note and guarantee?

A. That is correct.

Q. With which we are now concerned?

A. That is correct.

Q. You said Mr. Goodwin was nominated by the Federal Reserve Bank or the War Department?

A. War Department.

Q. Can you tell us how Mr. Goodwin's appointment came into being?

A. (No answer.)

Q. How did it happen that they appointed him?

A. As near as I can recall the Federal Bank or—not the Federal Bank, but the War Department—that is the representative of the War Department, Major Taylor, suggested that perhaps we should have someone there to manage the business and to put it on a more efficient basis.

Q. You were having financial difficulties about that time, were you not?

A. That is correct.

Q. And you talked to Major Taylor about some additional financing, is that right?

A. That is right.

Q. And it was mutually agreed, was it not, at

(Testimony of Howard B. Morrow.)

that time, that Mr. Goodwin would become the manager of Morrow [28] Aircraft?

A. It was.

Mr. Veale: If your Honor please, I do not like to object all the time but——

The Court: I told him I was going to let him get his story in.

Mr. Veale: I appreciate that, your Honor, but I have read the story three or four times.

The Court: I haven't so it will be new to me.

Mr. Veale: And it has nothing in the world to do with the issues before your Honor, not a thing. It merely sets out some equities——

The Court: I assume he is going to make it brief.

Mr. Curtis: I am not going to bring out the matters set forth in my letter. I am merely going to bring out some of the background upon which this note, this Government's Exhibit A or 1 was and must be interpreted. Not only that, but also the other things which existed which will nullify the slightest inference that there was any consent from Howard Morrow to this extension. I am not going to——

Mr. Veale: We have no objection to that. If counsel confines it to that we will have no objection.

Mr. Curtis: That is the entire purpose of it.

The Court: Proceed.

Q. (By Mr. Curtis): Now, can you tell us—I presume that you and Colonel Taylor had some discussion with respect [29] to Mr. Goodwin's re-

(Testimony of Howard B. Morrow.)

responsibilities. Can you tell us what his responsibilities were—to whom was he responsible?

A. Mr. Goodwin you mean?

Q. Yes.

A. Well, my impression was that he would be, you might say, jointly responsible to the Army and to Morrow Aircraft. He was hired and paid by Morrow Aircraft but the Army—well, they found him and it was arranged that he should go to work.

The Court: Where is Mr. Goodwin now?

The Witness: I don't know, your Honor.

Mr. Veale: He is a member of the Armed Forces, I think, and is not available.

Mr. Curtis: Mr. Goodwin is here locally somewhere I think. I don't know.

Q. (By Mr. Curtis): Mr. Goodwin was suggested to you by Major Taylor?

A. Yes, sir.

Q. You did not know Mr. Goodwin before?

A. No.

Q. Didn't know him in any other connection?

A. No.

Q. And you did not meet him until after he had been appointed, did you? A. Yes. [30]

Q. You met him before? A. Yes.

Q. But he was shortly taken in and put into that position? A. I met him once.

Q. Now, then, after he went in the loan was approved and the note signed?

(Testimony of Howard B. Morrow.)

A. Mr. Goodwin, as I recall, negotiated the loan.

Q. He negotiated this \$125,000 loan?

A. Yes.

Q. Which was joined with the \$100,000 loan to make it \$225,000? A. That is correct.

Q. And in that negotiation did you participate? Did you participate in negotiating with the American National Bank for this additional \$125,000?

A. Yes, sir.

Q. With Mr. Goodwin? A. Yes, sir.

Q. He was active both in his negotiations with the American National Bank and also with the War Department? A. That is correct.

Q. And the loan was made. Now, subsequent to the making of the loan you and Mr. Goodwin had a disagreement, did you not? [31]

A. (No answer.)

Q. Or what, if any?

A. Well, if I may say so, I would not call it a disagreement.

Q. You tell us what happened.

The Court: I don't care what happened. If he left that is all there is to it.

The Witness: No, he didn't leave.

Mr. Curtis: This is vital, your Honor, as I think you will see.

The Witness: Well, I was—I disagreed with the way Mr. Goodwin was running the business and I went to the Federal Reserve Bank and talked to Major Taylor and complained about it.

(Testimony of Howard B. Morrow.)

Q. (By Mr. Curtis): Now, the complaint that you made had to do with, I take it, with the manner in which he was running the business?

A. That is correct. Mr. Goodwin assumed a very dictatorial attitude only a day or two after he went to work there and his idea was that he was running the whole business. I knew that he didn't have the technical knowledge to run the business and I tried to help him. As a matter of fact, I called all of the entire organization together and asked for their cooperation with Mr. Goodwin, but immediately Mr. Goodwin became pretty dictatorial and he didn't have the [32] technical knowledge as to how to run the business, which I thought he did have, so I went to see Major Taylor and told him about it and I said that—well, as a matter of fact, as time wore on, our production went down very rapidly and our expenses went up, which did not make me happy at all.

Q. (By Mr. Curtis): That was while Mr. Goodwin was there? A. That is correct.

Q. Now, did you tell—you did go to see, I guess he was Major Taylor—excuse me. You did go to see Major Taylor? A. Yes, sir.

Mr. Veale: That is asked and answered.

Mr. Curtis: I want to lay a foundation for the conversation.

Q. (By Mr. Curtis): Was anyone else present?

A. Guy Goodwin.

Q. And this conversation took place where?

(Testimony of Howard B. Morrow.)

A. In Major Taylor's office, Federal Reserve Bank.

Q. As near as you can tell us, when did it take place?

A. Well, it was before the forming of the joint adventure and after the new had been signed.

Q. Was it before any negotiations had been undertaken with respect to the joint adventure?

A. Yes. [33]

Q. And at that time what did you tell Colonel Taylor or Major Taylor?

A. I told Colonel Taylor what I already told the court, that the man was handling the business very inefficiently and I was—well, that the thing was going downhill instead of uphill and Major Taylor turned on me very fiercely and used very profane language. He was vituperative and called me names, which I would not care to repeat here, and told me that I had better get off the dime and cooperate with Goodwin and do what they told me to do or else.

Q. Did he tell you—you say his manner was very forceful?

A. Well, he was extremely profane. He was about as profane as any man could be. He called me names that I have never been called before and, well, he was more than insulting.

Q. And he told you—

A. He told me I had to cooperate with Good-

(Testimony of Howard B. Morrow.)

win and to do what Goodwin told me to do or it would be just too bad for me.

Q. Then what did you do?

A. I said nothing at all. I felt there was no point in answering the man in like fashion or in quarreling with him. I just held my peace and I went back to work and did what Goodwin told me to do. [34]

Q. Then you went back to Rialto and offered to help, as I think you said a while ago, tried to help Goodwin?

A. Yes, sir.

Q. Did you still continue to try to help?

A. Naturally. My entire fortune was involved.

Q. What were your relations with Goodwin from that time on?

A. I cooperated with him. Did what he told me to do.

Q. Now, subsequently there were negotiations undertaken to form this joint adventure that we have talked about with Ziebarth?

A. That is right.

Q. Did you ever sit in on any phase of that negotiation?

A. Practically none.

Q. When you say practically none——

A. As a matter of fact, I was not at any meeting.

Q. Well, when was it that you first found out that there was any such thing in the air?

A. Well, I was told what they were doing.

Q. By whom?

A. By Goodwin.

(Testimony of Howard B. Morrow.)

Q. Were you asked whether or not it was in accordance with your wishes?

A. Honestly I can't recall whether I was asked or not.

Q. Well, you were told in a general way what was being [35] undertaken?

A. Yes. I knew what was going on.

Q. But you did not attend any of the negotiations as a matter of fact?

A. I don't believe so.

Q. And in the final analysis a contract was—a joint adventure agreement was prepared and that agreement, of course, was signed by the corporation but you did not sign it as an officer at that time?

A. I don't believe so.

Q. In fact, that agreement was signed January 19, 1943. You were not even in this part of the country at that time?

A. No, I wasn't.

Q. Well, thereafter with respect to any matters pertaining to the corporation that required the signature of the president or other officers, they were prepared and handed to you for signature. I am not speaking now of the joint adventure but just generally?

A. Yes, that is correct. I was sort of, if I may say so, a rubber stamp. After all, I was still the president of the corporation and as president I had to sign certain things in order to keep other things moving, but it was nominal.

Q. I would like to hand you Government's Exhibit 1 and ask you—let me hand you the original

(Testimony of Howard B. Morrow.)

of Government's Exhibit 1 and that is the letter which bears your signature. [36] Do you know who prepared that? A. No.

Q. Do you know whether or not you prepared it? A. I know I didn't.

Q. Do you remember the circumstances under which it was handed to you?

A. No. I didn't even know I had signed such a letter until it was shown to me.

Q. In fact you didn't know you signed such a letter until it was shown to you personally here?

A. That is right.

Q. Now, as a part of that same transaction the American National Bank agreed to loan Morrow Aircraft another \$50,000, didn't they?

A. Yes, they did.

Q. Did you or to your knowledge any other officer of the Morrow Aircraft Company request the American National Bank for an additional loan?

A. No officer of our corporation made that request to my knowledge.

Mr. Veale: If the court please, that is certainly self-serving.

The Court: What has it to do with this transaction?

Mr. Veale: Nothing.

Mr. Curtis: It has this to do, your Honor. There was [37] an additional \$50,000 loaned the Morrow Aircraft Corporation, not upon the instigation of the Morrow Aircraft Company, but upon

the instigation of the War Department in order that this joint adventure would work out. No attempt was made to ask Mr. Morrow whether he consented to it or did they care and they have never and to this day they recognized that there is no liability.

The Court: That has nothing to do with this case.

Mr. Morrow: I would like to put it in for whatever it is worth.

The Court: It isn't worth enough to put in.

Mr. Veale: We object to it as immaterial and irrelevant.

The Court: Objection sustained.

Mr. Curtis: That is all.

Mr. Veale: No further questions. The Government rests.

Mr. Curtis: The defendant rests.

The Court: Do you gentlemen desire to submit any additional authorities?

Mr. Veale: I don't know, your Honor, whether my memorandum that I submitted is intelligible. I think probably I would like to have an opportunity to redraft it. It was done rather hurriedly.

The Court: This case has been pending a long time and [38] the court has granted a number of continuances in order that it might be adjusted outside and avoid the necessity of a judgment, and if either side desires to submit any additional authorities you may do so.

There is no question in the court's mind, in view of the exhibit, that Mr. Morrow was aware of what

was going on. It doesn't impress the court very seriously to have a man of Mr. Morrow's long experience coming here and saying that he was doing these things but did not know what he was doing.

Mr. Curtis: Could I be heard for a moment on that?

The Court: Well, I shall not object to listening, Mr. Curtis, but——

Mr. Curtis: I would like to make my point and my position clear in that respect.

We have stipulated and admitted from the beginning that Mr. Morrow knew what was going on which, of course, brings us directly under the line of cases of which I find none contrary, to the effect that there is no obligation upon a guarantor to speak up and say that he objects when he has full knowledge of an alteration to be made. He has no obligation whatever. That obligation is upon the creditor to see that he does consent.

Now, Mr. Morrow knew what was going on. We admit that he knew all along—not that he was a principal in the [39] transaction. He was not. He knew about it more or less by way of courtesy and he was informed—it is true he had no thought of a guarantee. Nobody had any thought about whether the guarantee was going to be released or whether he would be exonerated. That was not one of the considerations. The consideration here merely was to put this thing in shape so they could go on for further production.

Mr. Morrow was requested to sign as the president of the corporation this one instrument.

Now, we submit that there is not only nothing in this instrument which can by any stretch of the imagination be considered as a consent. There is evidence here of the fact that Mr. Morrow, even in signing this, was not taking the initiative. He was not taking an active part in any portion of this transaction which the cases say he must show if there is no actual written consent.

Now, those cases—I have not read counsel's memorandum. He just handed it to me when I came in this morning. I would like at least to have an opportunity to read that and file such supplemental authorities as I may think—as may seem advisable. But that particular question of law I think we have exhausted and if there are any cases contrary in counsel's brief I shall be very much surprised because I don't think there are any and with that I will not require much time. [40]

Mr. Veale: I would suggest this, your Honor. I have no additional authorities that I desire to file but I just thought that perhaps I might be able to get my present memorandum in a little better condition or make it a little more intelligible.

The Court: I wouldn't waste paper for that purpose. I think I can follow your reasoning. I have not examined your cases but I have read them.

I will give you gentlemen five days to submit any additional authorities you desire to submit with the understanding that there are only two points to be

covered: That is consent and variation in the note and guarantee.

Mr. Veale: Very well, your Honor.

Mr. Curtis: And if there is anything that requires answering——

The Court: The court will ask for it.

(Whereupon, at 11:00 o'clock the above-entitled matter was concluded.) [41]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 26th day of Feb., A.D., 1946.

/s/ JACK D. AMBROSE,
Official Reporter.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT
OF PROCEEDINGS

Appearances:

For the Plaintiff: Charles Veale, Esquire, Asst.
U. S. Attorney.

For the Defendant: Jesse W. Curtis, Esquire.

Los Angeles, California,
Friday, April 4, 1947, 10:00 a.m.

(Case called by the clerk.)

Mr. Veale: The plaintiff is ready, your Honor.

Mr. Curtis: The defendant is ready.

The Court: Who wants to proceed first?

Mr. Curtis: May I file an additional trial memorandum?

The Court: Yes.

Mr. Veale: I think, if your Honor please, the record of the previous hearing indicates that we have but one issue before the court and that is whether or not Mr. Morrow consented to the alteration agreement.

Mr. Curtis: I think there is a second issue, too, is there not? It is an issue of law which we raised, namely, that the guarantee refers: "To a note of even date herewith", whereas the note itself was dated at a subsequent date.

It has been stipulated that the note was executed as a part of the same transaction but we still reserve our objection.

I don't know that there will be any further testimony with respect to it.

Mr. Veale: That may well be. We have present this morning certain witnesses who were not available before and I would like to have the opportunity of presenting them.

The Court: The only thing is Mr. Curtis asked for the opportunity of taking additional testimony. I don't know who [44] should proceed first.

Mr. Veale: My understanding was the case was reopened.

The Court: It was reopened.

Mr. Curtis: I have no objection to a full hearing on the matter.

The Court: Who wants to proceed first?

Mr. Veale: I believe I should put on my testimony.

The Court: All right.

Mr. Veale: I would like to call Mr. Morrow for further cross-examination.

The Court: Very well.

HOWARD B. MORROW,

called as a witness by and on behalf of the defendant, having been previously duly sworn, was examined and testified further as follows:

Cross-Examination

(Continued)

By Mr. Veale:

Q. Mr. Morrow, on or at the time you signed the written guarantee, which you admitted you signed, did you make any objection to it?

(Testimony of Howard B. Morrow.)

Mr. Curtis: Objected to as incompetent, irrelevant and immaterial. The guarantee speaks for itself.

Mr. Veale: I think it will be very material, your Honor.

The Court: Objection overruled. [45]

The Witness: You asked me if I made any objection?

Mr. Veale: Yes.

A. To the guarantee at the time I signed it?

Q. Yes; the execution of the guarantee at the time you signed it?

A. I can't recall that I did.

Q. Will you say you did not or will you say that you did make such an objection?

The Court: He said he doesn't recall, counsel.

Mr. Veale: Very well.

Q. After the contract was executed and up to the time this suit was filed had you made any objection to it? A. Any objection?

Mr. Curtis: Just a minute. I am going to object to that as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

The Witness: Will you re-state your question, please?

Q. (By Mr. Veale): After you had signed the contract and up to the time that this suit was filed had you objected to the alteration?

A. Not to my knoweldge.

(Testimony of Howard B. Morrow.)

Q. In your previous testimony the following question was asked you and the following answer was given:

“Did you participate——”

Mr. Curtis: Where is that? [46]

Mr. Veale: Page 23, line 18. “Did you participate in any negotiations wherein Mr. Ziebarth and the Morrow Aircraft Company were to become engaged in a joint adventure?”

And your answer,

“Only casually. I only—Well, I won’t volunteer any information unless you ask me.”

Do you recall so testifying?

A. Yes, I do.

Q. What did you mean by that?

A. Well, if I may explain in an informal manner. This is the first time I have ever been in court and I was only trying to conduct myself in such a fashion as might have been expected of me. In other words, I was trying to conform to the usual procedure in answering and being asked questions in court.

Mr. Curtis: Counsel, I think the witness is confused by the part of the answer you are referring to.

Mr. Veale: I am referring particularly to the use of the words, “only casually”. What did you mean by that?

A. Well, I meant this. That the joint adventure agreement was not initiated—that is, the discus-

(Testimony of Howard B. Morrow.)

sions were not initiated by myself or by the Morrow Aircraft Corporation. They were initiated by, as I recall, by Colonel Jay Taylor of the Federal Reserve Bank and Mr. Fred Ziebarth. So any discussion that I may have had with them did not originate [47] with me and it was not my idea as president of the corporation.

Q. (By Mr. Veale): You knew about the arrangements that were proposed with reference to the increased loan, did you not?

A. Yes, I did.

Q. And did you meet Mr. Ziebarth?

A. Yes. As I recall, I was requested to come to the Federal Reserve Bank in Los Angeles and meet Mr. Ziebarth.

Q. Do you recall who else was present?

A. Well, I recall that Jay Taylor was present and I don't know whom else. I can't recall at the time.

Q. Was that before or after you had met Mr. Goodwin? A. I believe it was afterward.

Q. When, by the way, did you first meet Mr. Goodwin?

A. Well, it is difficult to recall, but as far as I can recall, and this may not be accurate, I believe I met him at the Federal Reserve Bank.

Q. Was that before or after he was made manager of the plant? A. That was before.

Q. Now, after you met him there at the Federal Reserve Bank you saw him daily, did you not?

A. Would you repeat that, please?

(Testimony of Howard B. Morrow.)

Q. After you met him at the Federal Reserve Bank and [48] after he became manager of the plant out there you saw him almost daily, did you not? A. Yes.

Q. And worked with him there in the plant?

A. Yes.

Q. Do you recall having seen Mr. Ziebarth at the Morrow Aircraft Company plant at any time during the early part of January of 1944?

Mr. Curtis: You say 1944?

Mr. Veale: Yes, 1944.

Mr. Curtis: That was long after.

The Witness: No.

Q. (By Mr. Veale): Mr. Goodwin was still employed or still operating the plant in January of 1944, was he not? A. Not to my knoweldge.

Q. When did he cease operation?

A. The joint adventure was formed January 19, 1942, I believe.

Q. Maybe I have the wrong date. I am sorry if I have. A. I think you have.

Mr. Curtis: 1943.

The Witness: It is 1943, I am sorry.

Mr. Veale: It would not be 1944. Just a moment, your Honor. January of 1943?

The Witness: Yes. Now, what was the question, please? [49]

Q. (By Mr. Veale): Did you see Mr. Ziebarth at the Morrow Aircraft plant at any time during the early part of 1943? A. No, I didn't.

Q. Did you have any conservations with Mr.

(Testimony of Howard B. Morrow.)

Goodwin at the Morrow Aircraft plant during the early part of January 1943 with reference to the necessity of getting more money? A. Yes.

Q. Do you recall any particular conversation?

A. May I qualify that statement? I did see Mr. Goodwin and discussed the necessity of getting more money but I cannot say that it was during the early part of January 1943.

Q. Do you recall the date when the Ziebarth-Morrow Aircraft Corporation joint adventure became effective?

A. Yes. It became effective January 19, 1943.

Q. These conversations that you had with Mr. Goodwin then were either prior or after that time?

A. They would necessarily be prior.

Q. Prior? How long prior?

A. You mean the conversation relative to the necessity of getting additional funds?

Q. Yes.

A. Well, those conversations would have been held prior [50] to the time of forming the joint adventure.

Q. Do you recall how many such conversations you may have had with Mr. Goodwin concerning those matters? A. No, I don't know.

Q. Now, on or about January 10, 1943, did you have any conversation with either Mr. Goodwin or Mr. McCook with reference to the Ziebarth joint adventure? A. You say did I?

Q. Yes.

(Testimony of Howard B. Morrow.)

A. Mr. Veale, you are asking me to state—you are asking me if I had certain conversations on certain dates.

The Court: No, he did not. He asked you if you had any with those men. Read the question.

(Question read.)

The Witness: To be perfectly honest I cannot recall whether I had a conversation with those two gentlemen on that date.

Q. (By Mr. Veale): To refresh your memory, Mr. Morrow, I show you Plaintiff's Exhibit 1, which has already been introduced in evidence, and which you say you signed. Will you look at that?

A. Now, what is your question?

Q. Now, the question is, did you have any conversations with either Mr. Goodwin or Mr. McCook on or about January 10, 1943, with reference to the Ziebarth joint adventure? [51]

A. To my knowledge, I had no conversation with Mr. McCook.

Q. You did not?

A. I do rather hazily recall Mr. Goodwin presented that letter to me and asked me to sign it.

Q. And I believe you already testified that that is your signature? A. That is correct.

Q. You transacted business with the American National Bank for some years, did you not, Mr. Morrow? A. Yes, I have.

Q. You know Mr. McCook quite well?

A. I know him reasonably well.

(Testimony of Howard B. Morrow.)

Q. You have been a customer there at the bank for a good long while?

A. Well, prior to that time I had been a customer there for possibly a year and a half.

Q. You knew, did you not, Mr. Morrow,—I will withdraw the question.

At or about the time that we are now discussing, that is to say in the latter part of 1942 and the early part of 1943, you were the majority stockholder of the Morrow Aircraft Corporation, were you not?

A. I was the principal stockholder. I don't know what "majority" means. [52]

Q. You owned the greater part of the stock, didn't you? A. Yes, I did.

Q. And you were familiar—and by the way, you were the president of the concern?

A. That is correct.

Q. And you were familiar with all of its business?

A. Well, generally speaking I was. I would not say I was familiar with all of the business.

The Court: You thought you were, anyhow, didn't you?

Q. (By Mr. Veale): You knew in the early part—or, rather, in the month of November, 1942, you knew that the Morrow Aircraft Company was obliged to have additional funds with which to operate, didn't you?

The Court: That has been asked and answered, counsel, I believe.

(Testimony of Howard B. Morrow.)

Q. (By Mr. Veale): You didn't get along too well with Mr. Goodwin, did you?

A. No, I didn't.

Q. Isn't it a fact, Mr. Morrow, that you were anxious and willing to engage in the Ziebarth joint adventure because it would give the concern more money and would get rid of Mr. Goodwin.

A. No, sir, I don't.

Mr. Curtis: Just a moment.

Q. (By Mr. Veale): That is not true? [53]

A. No.

Q. Did you know that the Morrow Aircraft Company would as a result of the Ziebarth joint adventure, put more cash into the affairs?

A. Did I know that?

Q. Yes.

A. Well, that was a statement—that statement is a little misleading if I may say so.

Q. I don't intend to mislead you. What are the facts with respect to that?

A. Well, the facts are these. That the Ziebarths were not putting money into the Morrow Aircraft corporation. They were taking over the operation of the corporation's business, handling their own money in their own way. And at the time they took over the corporation no longer had any say as to the management or conduct of the business and the money that Ziebarth invested they invested themselves and controlled themselves. If you see what I mean.

The Court: That relieved you, did it not?

(Testimony of Howard B. Morrow.)

The Witness: It relieved me as far as being the president of the corporation.

The Court: Relieved you of the worries of the finances too, did it not?

The Witness: Yes, I would say so.

The Court: In other words, you considered it advantageous [54] to you, did you not, or you would not have entered into it?

The Witness: Well, the corporation was in pretty desperate circumstances at that time and——

The Court: And you did it to try to pull your corporation out of the hole, didn't you?

The Witness: Yes; but at that time our first consideration was to continue to make articles that would be of assistance in the war effort and the corporation or myself were really secondary at that time.

If you can recall along about 1942 practically everybody was hysterical in their desire to be of assistance to the United States Government and our only consideration was to continue to make more and better articles which would be of assistance in the prosecution of the war. I don't know if that is correct English, but that is the idea.

The Court: But at the same time you considered this arrangement which you were entering into was of advantage to the corporation in order to carry out its objectives?

The Witness: That is correct.

Q. (By Mr. Veale): As a result of the activities of the joint adventure is it not true, Mr. Morrow,

(Testimony of Howard B. Morrow.)

that certain dividends were paid to the Morrow Aircraft Company which in turn were forwarded for payment on this note? A. That is correct.

Q. That was the result of the efforts of the joint [55] adventure, Mr. Ziebarth's management?

A. Yes.

Q. And you did benefit to that extent?

A. No. What do you mean by "You"?

Q. The corporation?

A. The corporation benefited to the extent of the amount paid by Ziebarth and which was relayed to the bank in payment of the note.

Q. During the time that the Ziebarth joint adventure was in operation were you, as the guarantor, called upon at any time to make any payments?

A. No.

Q. Getting back for a moment to the times and occasions when you say that you and Mr. Goodwin had certain conversations there at the plant with reference to the Ziebarth adventure. What was the nature of those conversations and who else was present, if anyone?

The Court: What conversations are you referring to, counsel?

Mr. Veale: Conversations during the early part of January 1943.

The Court: They might have been talking about the weather. I am not interested in that.

Mr. Veale: Sir?

The Court: They may have been talking about the weather [56] at that time.

(Testimony of Howard B. Morrow.)

Mr. Veale: I am trying to limit it, your Honor, to the Ziebarth plan. That is what I tried to ask him.

The Witness: Mr. Veale, as nearly as I can recall, in the early part of January 1943 I was on the verge of a nervous breakdown and I was sent away from Rialto, to go out and get some rest, and I went to Miami, Florida, to try and recuperate. I don't recall the exact time that I left Rialto but I think it was prior to January 10th. Still, it couldn't have been because I signed that paper at that time.

Q. (By Mr. Veale): That is what I was thinking but it is——

A. But it is quite possible that paper was sent to me in Miami and I may have signed it there.

Q. Why, isn't it a fact, Mr. Morrow, that during the period beginning approximately November 15, 1942, to and through January 19, 1943, you were called upon by Mr. McCook of the American National Bank to sign innumerable papers with reference to this particular transaction?

A. The term "innumerable" is rather——

Q. Well, many. Put it that way. Many papers with reference to this transaction.

Mr. Curtis: I am going to object to that, your Honor, on the ground the papers themselves are the best evidence.

Mr. Veale: Well, I don't know. He has got to answer [57] yet whether he signed the papers.

Mr. Curtis: He said he signed a letter.

Mr. Veale: Well——

(Testimony of Howard B. Morrow.)

The Witness: I signed some papers, I will agree.

Mr. Curtis: Just a minute. Let us get this ironed out.

The Court: He answered the question, and saved me the necessity of a ruling.

Mr. Curtis: What was the answer?

The Witness: I said I signed some papers.

Q. (By Mr. Veale): I don't know whether I asked you this or not. I believe I did. Yes, I will withdraw that. When was the joint adventure terminated?

A. The joint adventure was terminated January 19, 1946.

Mr. Veale: I believe that is all.

Redirect Examination

By Mr. Curtis:

Q. Mr. Morrow, I think you testified at the last hearing that Mr. Goodwin came to Rialto as the manager probably near the end of October 1942?

A. That is approximately right.

Q. That is your best recollection?

A. Yes.

Q. At that time was there in process an application for an additional loan? [58]

A. Yes.

Q. In other words, the loan of \$125,000 which was combined with the \$100,000, which the company already owed the American National Bank, was consolidated in a note dated toward the middle of November 1942?

A. Correct.

Q. And it was with respect to that loan and that

(Testimony of Howard B. Morrow.)

note that the guarantee which we are now concerned with, applied? A. Yes.

Q. So that when Mr. Goodwin came in October negotiations had already been undertaken to obtain that loan by the officials of the Morrow Aircraft Corporation? A. That is correct.

Q. And before Mr. Goodwin came he assisted further and was active in the consummation of that loan? A. That is right.

Q. At least up until the time that Mr. Goodwin came to Rialto you were active in the affairs of the corporation, were you not? A. I was.

Q. And how long did you continue in active control of the operations of the corporation?

A. A few days after Mr. Goodwin became manager.

Q. I have asked this before but let me just review the thing up to this point. You had a conversation with [59] Colonel Taylor at which time you testified he told you in no uncertain terms that Mr. Goodwin was the manager and was to be in absolute control of the operations in Rialto?

A. That is right.

Q. When with respect to that conversation did your active participation in the corporation cease?

A. Immediately.

Q. You don't recall the date upon which you had that conversation, approximately when it took place?

A. No, I don't. It was—I could hazard a guess. The Court: Well, let us not guess.

The Witness: All right.

(Testimony of Howard B. Morrow.)

Q. (By Mr. Curtis): Now, you have testified that you signed the letter dated January 10, 1943, and you also testified that during the period immediately preceding the execution of the joint adventure you signed numerous papers. Do you recall any other paper you signed?

A. No, I don't.

Mr. Curtis: That is all.

Mr. Veale: That is all.

The Court: That is all.

Mr. Veale: At this point, your Honor, Mr. Curtis has called my attention to the fact that the guarantee contract in question has not yet been introduced in evidence. I should like to offer that.

The Court: There is a copy attached to the pleading.

Mr. Veale: May the copy attached to the pleadings be deemed as an exhibit?

Mr. Curtis: I have no objection.

The Court: You mean the guarantee?

Mr. Veale: Yes.

The Court: It is admitted in the answer, is it not, the execution of it?

Mr. Curtis: There is reference in the transcript. That is the thing I had in mind. It is to the effect that he desired to introduce in evidence as Plaintiff's Exhibit 1 the guarantee, but it was never done. I don't know whether he wants to introduce it or not instead of it.

The Court: That is the letter?

Mr. Curtis: The letter went in as Exhibit 1, but

at the time I introduced it he said, I think, it should be Exhibit 2.

The Court: Have you a copy to introduce?

Mr. Veale: I think I have one more copy.

The Court: Or can it be stipulated that the copy attached to the complaint is a true and correct copy and be deemed in evidence?

Mr. Curtis: I will so stipulate.

Mr. Veale: That is what I had in mind, your Honor.

The primary obligation, that is to say, the notice, which was executed in November and which is the motive for the [61] guarantee contract, is not yet introduced in evidence. Mr. Curtis has very courteously consented to stipulate that the note as set forth in the copy of the chattel mortgage, which is a part of the pleadings in this case——

The Court: Part of the defendant's answer?

Mr. Veale: Yes; may be considered as being offered. I understand, however, he does want to make an objection.

Mr. Curtis: I want to make an objection to that offer, your Honor, on the ground that I have previously stated, that there is a fatal variance between the note and the guarantee in that the guarantee refers to a note of even date, and the date of the guarantee being——

The Court: But I understand you do not object to the introduction of the note because it refers to a copy that is attached to your pleadings but only as to the materiality?

Mr. Curtis: Yes.

The Court: I am going to overrule the objection because that will be one of the questions the court will have to pass upon.

Mr. Curtis: I wanted the record to be clear on it.

Another thing, I would like to call your Honor's attention—in fact, I would like to inquire whether or not the copy of the note, which appears in the pleadings, indicates who signed the note. Now, the copy I have in my file is an unsigned copy. [62]

The Court: And the one filed likewise is an unsigned copy.

Mr. Curtis: I do not know that it makes any difference but we will stipulate that it was duly signed by officers of the corporation.

Mr. Veale: That is agreeable.

The Court: You may proceed.

Mr. Veale: Mr. Goodwin, will you take the stand, please?

GUY GOODWIN,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Guy L. Goodwin.

The Court: You stipulate it was duly executed by the corporation?

Mr. Curtis: Yes.

Mr. Veale: Yes.

(Testimony of Guy Goodwin.)

Direct Examination

By Mr. Veale:

Q. Mr. Goodwin, you of course know Mr. Morrow? A. I do.

Q. And Mr. Curtis? A. I do.

Q. And Mr. McCook? [63] A. Yes, sir.

Q. Mr. Goodwin, did you have occasion in the fall of 1942 to take over the managership of the Morrow Aircraft Corporation? A. I did.

Q. At that particular time did you meet Mr. Morrow? A. I did.

Q. Do you recall what date you took over or approximately what date it was?

A. I know approximately the date. It might help if I would review the situation which resulted in my going down to the Morrow Aircraft and taking over.

Q. I think that is pretty generally understood already, Mr. Goodwin.

The Court: I would like to hear the story.

Q. (By Mr. Veale): All right, I beg your pardon.

Mr. Curtis: I submit it is hearsay.

Mr. Veale: Much of it is hearsay.

The Court: Then fix the date as near as possible to the best of your memory.

The Witness: I went down to the Morrow Aircraft to assist in the management of the company the latter part of October, 1942. The actual date on which I was to assume the management was, I

(Testimony of Guy Goodwin.)

believe, as of November 15th. I believe I can refresh—I can determine the exact date if I may have access to the files which I brought with me.

Q. (By Mr. Veale): Yes, if it refreshes your memory you may refer to them.

A. My responsibilities with respect to the funds and the expenditures of the Morrow Aircraft Corporation commenced as of November 19, 1942. Prior to that time I had been assisting Mr. Morrow in connection with the business and trying to work with the creditors and in an effort to determine as to whether or not the creditors would not press action so that the company might be thrown into receivership as the bank was not disposed to advance monies unless they knew that they—unless they had reasonable assurance that some of the creditors, one or more of the creditors, would not step in and disturb the operation of the company.

Q. (By Mr. Veale): Did you have success in that effort?

The Court: What do we care whether he had successor not? What I am interested in is what occurred relative to this particular transaction.

Mr. Veale: It was a material benefit flowing not only to the Morrow Aircraft Corporation but to this defendant.

Mr. Curtis: What difference would it make?

The Court: It seems to me whether they had success or not is not of any importance here. What I am interested in is this. Mr. Morrow has pre-

(Testimony of Guy Goodwin.)

sented a picture here that he was the pawn of Mr. Goodwin. [65]

Mr. Veale: I appreciate that.

The Court: And I want to find out whether Mr. Morrow had anything to do with the execution of these various papers. I assume the real question is whether he had anything to do with the agreement to withhold foreclosure.

Mr. Veale: Very well, your Honor.

Q. Mr. Goodwin, after you assumed the management of the corporation did Mr. Morrow remain there and cooperate with you?

A. He was at the plant almost daily. I endeavored to cooperate. The difficulty was the organization could not work with two bosses. One of us had to assume the responsibility because otherwise it would have meant conflicts in instructions to the employees.

Mr. Morrow evidenced every desire to cooperate in the business of the company. There was a difference of opinion between us as to how the affairs of the company should be conducted, resulting in misunderstandings, which were cleared up by Major Taylor, by an interview with Mr. Morrow and me, followed by a letter addressed to Mr. Morrow under date of December 2nd, 1942, of which a copy was forwarded to me, whereby the complete management was delegated to me.

Q. (By Mr. Veale): What was the date of that letter?

(Testimony of Guy Goodwin.)

A. December 2nd, 1942. I have a copy of the letter signed by J. I. Taylor, Major, United States Army. [66]

Q. After you assumed the management, total management, did you have occasion to meet Mr. Ziebarth?

A. I had met Mr. Ziebarth prior to the time that I took over the complete management and during, I believe, November 1942, a joint adventure was entered into with Mr. Ziebarth for the manufacture of a certain tank, an expendable tank that had been developed by the Morrow Aircraft Corporation.

A contract was prepared. I called in the late Paul M. Gregg as attorney to represent Morrow Aircraft and to advise us in connection with that contract, so that there was a joint adventure in operation during, I believe, part of November, but I am sure during December between Morrow Aircraft and Ziebarth whereby space was set aside to Ziebarth.

The drawings and equipment were made available to him and he paid the cost of the experimental work and the development work in connection with this tank.

He had his own representatives at the plant. His business was under the direction of Mr. Murray Carr, one of his associates or employees, so that we were in constant touch with the Ziebarth organization during the major portion of December at least.

(Testimony of Guy Goodwin.)

Q. At or about that time did you have any—or, did you undertake to make any arrangement with Mr. Ziebarth with reference to a second joint adventure?

A. I did. I realize that—— [67]

The Court: Just a moment. Isn't the court primarily interested in the surrounding circumstances of the execution of this letter of January 10th?

Mr. Veale: Yes, your Honor. I am trying to get up to that but I think your Honor will be obliged in the end to know all of the facts and circumstances that surrounded these matters. And I think the Government is entitled to have your Honor know those things. They are certainly material. I have some authorities which I am going to present to your Honor which definitely establishes that.

The Court: I know, but this witness's answers are in generalities. That is no criticism of the witness, but the nature of the questions bring forth general answers.

Mr. Veale: I propose to show by this witness the fact that Mr. Morrow was there, had knowledge of all these things, did not object to it and eventually signed this letter dated January 10th, and eventually signed—and up to this good hour, to the time he filed his answer in this case, he had not made any objection to it. That is what I propose to show.

The Court: Well, the only difference between the court and you is that your method of trying to establish that differs from mine. I am not trying to

(Testimony of Guy Goodwin.)

preclude the establishment of it but can it not be ascertained through questions that bring forth the dealings that Mr. Morrow had with the Ziebarth Company whereby this joint adventure was entered into? [68]

Mr. Veale: That is precisely what I am trying to get around to.

The Court: Then why don't you ask him? Get down to that.

Mr. Veale: I want to get it into the record, your Honor, and I think I am entitled to that.

The Court: All right, go ahead.

Q. (By Mr. Veale): Was Mr. Ziebarth present there at the Morrow Aircraft Company at any time after you initiated the arrangements with reference to the second joint adventure?

A. I do not remember.

Q. Did you finally arrange for the second joint adventure? A. Yes.

Q. When and where did that take place?

A. To answer directly——

The Court: Did Mr. Morrow participate in the negotiations?

The Witness: In the preliminary negotiations Mr. Morrow did not participate. The preliminary negotiations were at my suggestion, instituted by Major Taylor with Mr. Ziebarth.

Q. (By Mr. Veale): All right. Let us get down to those parts of the arrangement in which Mr. Morrow did participate.

(Testimony of Guy Goodwin.)

The Court: And that is where I am trying to get you, counsel. [69]

Mr. Veale: I have been leading up to that all along. I have been trying my best to get up to the trough.

Q. Tell us that portion of the arrangements with Mr. Ziebarth in which Mr. Morrow did participate.

A. I cannot do that. My memory is not clear enough with respect to the meetings that occurred at that time to give you a definite answer.

Mr. Morrow did not attend all the meetings. Some of the meetings were attended by his brother.

Q. Did Mr. Morrow attend any of the meetings?

A. Not according to any notes that I retained and which I have in my files.

Q. Do you recall having had any conversations with Mr. Morrow during the period beginning January 2nd, 1943, to and including January 19, 1943?

A. I do not remember any definite conversations with Mr. Morrow. During a portion of that period I believe that he was out of the state.

Q. Can you recall any occasion during the period I have set forth when you and Mr. Morrow, Mr. Howard Morrow, there at the Morrow Aircraft Corporation, discussed any phase of the Ziebarth second joint adventure?

A. May I have that question again, please?

The Court: Read the question.

(Question read.) [70]

(Testimony of Guy Goodwin.)

A. I do not recall any definite occasion during that period when the matter was discussed with Mr. Morrow.

Q. Well, what do you mean by "definite," Mr. Goodwin?

A. As I previously stated, Mr. Morrow was there only a portion of the time after the first of the year—that is, January 1st, 1943, and my recollection is very hazy with respect to conversations with him during that period. We were in close touch when he was in the office but I cannot state that he was there during that period of time. I do know that he did not attend some of the meetings. I have records showing that his brother attended one of the meetings prior to January 19th, subsequent to the first of the year when the matter was discussed, fully discussed.

Q. Do you know of the occasion or any occasion when Mr. Morrow signed up necessary documents to put into force and effect the second joint adventure?

Mr. Curtis: Just a moment. That calls for a conclusion and I object to it on that ground. Furthermore, the instruments, if any, which he signed are the best evidence.

The Court: That objection is good, counsel.

Q. (By Mr. Veale): Did Mr. Morrow at any time during the time when you were connected with the Morrow Aircraft Corporation as its manager, and particularly during the month of January 1943, object to you or make any objections to you concern-

(Testimony of Guy Goodwin.)

ing the execution of the documents with reference to [71] the second joint adventure?

A. I do not remember of any.

Q. You and Mr. Morrow——

The Court: In other words, as I understand, he may have objected and you do not remember it?

The Witness: That is correct, your Honor. You will appreciate that considerable time has elapsed and——

The Court: Just a moment.

The Witness: It is difficult for me——

The Court: I am showing you plaintiff's Exhibit 1. Are you acquainted with that letter?

The Witness: I believe I have a copy of that letter in my file.

The Court: Are you familiar with the circumstances under which it was executed?

The Witness: Yes. I recall that the letter was prepared for his signature.

The Court: Did you prepare the letter?

The Witness: I did not prepare the letter.

The Court: Do you remember any discussion concerning the execution of that letter?

The Witness: I do not.

The Court: You may proceed.

Mr. Veale: That is all, Mr. Goodwin. [72]

Cross-Examination

By Mr. Curtis:

Q. Mr. Goodwin, I am not sure that we are all clear about these two joint adventures. There was

(Testimony of Guy Goodwin.)

a first joint adventure which related to the tank construction, that joint adventure being one between Morrow Aircraft and the Ziebarth Company?

A. That is correct.

Q. For the construction of these expendable tanks. That was a joint adventure which related specifically to that one phase of operation only?

A. That is correct.

Q. Isn't that true? A. Yes.

Q. And that the Morrow Aircraft Corporation carried on concurrently with the existence of that joint adventure with other operations?

A. That is correct.

Q. Now, the joint adventure that we are talking about here is the second joint adventure, is it not? In other words, it is a new joint adventure?

A. The one entered into on January 19th?

Q. January 19th, yes.

A. Was a new joint adventure which I believe nullified it or eliminated the original contract or the original contract [73] that was taken over under it.

Q. So that the joint adventure that was entered into in January, January 19th, 1943, was a complete joint adventure? By that I mean the entire operations of Morrow Aircraft were turned over to this new joint adventure and that the Ziebarth people then managed it under the new joint adventure agreement of January 19th?

A. That is correct, but I think that is—I think that is substantially correct. I would have one

(Testimony of Guy Goodwin.)

technical question—whether the Victory Trainer was included, which was owned by the Morrow Aircraft Company, whether that was actually included under the second joint adventure.

Q. I appreciate that. What I am getting at is up until the time you took the stand we had had no discussion of the joint adventure—first joint adventure. The second joint adventure, the one you refer to as the second joint adventure, was the one embodied in the agreement of January 19th, 1943?

A. That is correct.

Q. And it was in connection with that joint adventure that the bank as one of the parties of that agreement, agreed to withhold foreclosure upon their chattel mortgage during the period of that second joint adventure?

A. That is correct.

Mr. Curtis: May I see the copy of the letter which you [74] received from Colonel Taylor? Do you have any objection to us putting it into evidence? I would like to offer it, your Honor, if I may.

The Court: What is the date of it?

Mr. Curtis: May I ask some further questions? This letter is dated December 2nd, 1942.

Q. You received it through the mail, did you?

A. I did so.

Q. Do you know Colonel Taylor or Major Taylor's signature?

(Testimony of Guy Goodwin.)

A. I was reasonably familiar with it at that time.

Q. Anyway, you received——

A. I cannot answer that.

Q. You received this letter through the mail?

The Court: What materiality is the letter?

Mr. Curtis: It shows, your Honor, definitely the control which Mr. Goodwin was to have.

Mr. Veale: That is not denied.

The Court: Mr. Goodwin so testified.

Mr. Curtis: May I read the letter and your Honor can rule on it, or would your Honor like to read it? It merely bears out what Mr. Goodwin has testified.

The Court: According to your own statement there are only two questions of fact involved and those are whether Mr. Morrow consented to this waiver of security, and, secondly, [75] the question as to whether the note of "even date" and so forth——

Mr. Curtis: My point here is that there has been no actual consent. The only way——

The Court: I understand, but——

Mr. Curtis: The implied consent is the thing we will be concerned with. "Can the consent of Mr. Morrow be implied from his conduct?"

Now, the only thing that has been shown here is that although he did have knowledge of the transaction and that he signed this letter dated January 10th, I will argue that that letter in and of itself is surely no consent on the part of anyone. It does

(Testimony of Guy Goodwin.)

not purport to be a consent and so that in order to explain further the letter and what was intended by it and what the purpose was in signing it I think relates back to what position Mr. Morrow had in the operation.

He testified that he was a rubber stamp of the War Department here. This letter would bear that out.

The Court: Counsel, it is easier to admit it than to argue about it.

Mr. Curtis: I offer as Defendant's Exhibit C, I believe it is.

Mr. Veale: Objected to as immaterial and irrelevant.

The Court: I will let it in for what it is worth.

(The document referred to was marked as Defendant's Exhibit A, and was received in evidence.) [76]

Mr. Curtis: I think the transcript states that the chattel mortgage and the consent and waiver would be marked Defendant's Exhibit A and B. They haven't been so marked.

The Court: They have been introduced by stipulation as part of the pleadings and in the answer, and are deemed to be in evidence without marking as exhibits.

Mr. Curtis: Then I offer this for whatever number it is.

The Clerk: Defendant's Exhibit A.

Mr. Curtis: No further questions.

Mr. Veale: Just one further question.

(Testimony of Guy Goodwin.)

Redirect Examination

By Mr. Veale:

Q. Mr. Goodwin, while you were acting as manager of the Morrow Aircraft Corporation, while Mr. Morrow was president, were you on speaking terms?

Mr. Curtis: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

A. Yes.

Q. (By Mr. Veale): Mr. Morrow was quite agreeable, was he not?

Mr. Curtis: The same objection.

The Court: That calls for a conclusion.

Mr. Veale: As manager—— [77]

The Court: You were carrying on a diplomatic relationship, were you?

The Witness: Yes, your Honor.

The Court: At a distance?

The Witness: No.

Q. (By Mr. Veale): As manager of the plant——

The Court: Just a moment. Let me ask a question here. Did you and Mr. Morrow discuss the common problems of the company?

The Witness: Yes, your Honor.

The Court: With restraint or was it with the idea of helping each other or keeping him informed?

The Witness: (No answer.)

(Testimony of Guy Goodwin.)

The Court: In other words, I have gotten from Mr. Morrow's attitude that you were the top sergeant out there with a bayonet running that plant and Mr. Morrow only stuck his head in there when you were not looking.

Mr. Curtis: If your Honor please, I do not wish to object to your Honor's question but——

The Court: That is what Mr. Morrow's testimony sums up to.

Mr. Curtis: I would like to refer to the transcript as to what he actually stated.

The Court: I am trying to get their method of doing business. [78]

The Witness: Your Honor, we were in a small building. Mr. Morrow had lived with the people in the organization. They were his close friends. He had very definite ideas about how the business should be conducted. He realized that as well as I did that I had no particular knowledge of the aircraft business; that I was relying more upon general business judgment with respect to the conduct of the affairs of the business. There was a difference of attitude. Mr. Morrow was optimistic about the future possibilities of the company. I was pessimistic due to the fact that it was up to me to see that the overdrafts were minimized and that the funds were available to carry on the business of the company.

Mr. Morrow and his associates wanted to sell additional seats and items which the company was offering. I had a serious controversy with Mr. Mor-

(Testimony of Guy Goodwin.)

row and his associates as I did not see where the funds were going to be available with which we could manufacture the seats and, accordingly, we came to a point where it was very difficult for us to sit down around the table and arrive at any joint agreement with respect to the business.

The Court: When did that condition exist? On January 10th when this Ziebarth arrangement was made with the bank to waive foreclosure?

The Witness: The condition existed at that time and subsequent, [79] for practically the entire period subsequent to December 2nd, 1942.

The Court: Then as I understand it you, as a matter of fact, handled the arrangements with the bank for this Ziebarth second joint adventure?

The Witness: I cooperated. I handled the major portion of it, some of the details, but Mr. Curtis, attorney for the Morrow Aircraft, handled the legal end of it and the requirements were outlined by the Federal Reserve Bank—that is the requirements with respect to the papers which were to be executed and as they were the loaning agency, as they represented the—they were handling the matter through the San Bernardino bank, through Mr. McCook's bank, so the technical details were largely outlined by Mr. McCauslin and Major Taylor and their other people at the Federal Reserve Bank.

The Court: As I understand it, Mr. Curtis was representing Mr. Morrow?

(Testimony of Guy Goodwin.)

The Witness: Mr. Curtis sat in on the preparation of the agreements. He went to Long Beach to work with Mr. Ball, the attorney for Ziebarth, and attended two meetings that I am sure of, at the Federal Reserve Bank.

Mr. Curtis: Your Honor, I think your Honor mis-stated the witness's statement. Perhaps you did not do it intentionally. The witness stated that Mr. Curtis was acting as the [80] attorney for Morrow Aircraft Company and you said "Mr. Curtis, attorney for Mr. Morrow." You meant by that, I am sure, the Morrow Aircraft Company?

The Court: Yes.

Mr. Curtis: There is no testimony here that I was representing Howard B. Morrow personally.

The Witness: Mr. Curtis was employed by the Morrow Aircraft Company to do that work.

The Court: That is all. Any further questions?

Mr. Veale: That is the line of questioning I wanted to go into.

The Court: And——

Mr. Curtis: I would like to ask another question.

The Court: Very Well.

Recross-Examination

By Mr. Curtis:

Q. Mr. Goodwin, you were there at the time this loan for \$225,000 was consummated, were you not—that is, you were manager out there?

(Testimony of Guy Goodwin.)

A. I was made manager technically, I believe, when the loan had been consummated.

Q. But you were familiar with all the details?

A. I was familiar with the major portion of the details. I sat in on some of the meetings at the bank.

Q. And were you familiar with the security which the [81] bank took as security for that loan?

A. Yes.

Q. That included a chattel mortgage on all of the machinery and equipment for one thing, did it not? A. That is correct.

Q. Took an assignment of all the accounts receivable and the proceeds from any future production as security?

The Court: I think it could be assumed the bank took their eye teeth if it could get them.

The Witness: I cannot answer definitely the question you asked.

Q. (By Mr. Curtis): Do you recall they took a pledge of all of Mr. Howard Morrow's stock and Frank Morrow's stock in the corporation which constituted about seventy per cent of the capital stock—total capital stock? A. I do.

Q. And do you further recall that the note was a demand note? A. I do not.

Mr. Curtis: The note, of course, is in evidence here and speaks for itself. That is all.

Mr. Veale: That is all, Mr. Goodwin.

If the court please, I think Mr. Goodwin is anxious to get away from the City. He has a trip

planned, and as far as the Government is concerned we might excuse him. [82]

Mr. Curtis: We will be agreeable that he be excused.

Mr. Veale: Mr. McCook, will you take the stand?

ERNEST MCCOOK

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Ernest McCook.

Direct Examination

By Mr. Veale:

Q. Mr. McCook, you are affiliated with the American National Bank of San Bernardino?

A. I am.

Q. And were so engaged in the years 1942 and '43? A. I was.

Q. Do you know Mr. Morrow?

A. Yes, sir.

Q. Howard B. Morrow? A. Yes.

Q. He has been a customer of the bank there for some time, has he? A. He has.

Q. Mr. McCook, are you familiar with the joint adventure known as the Ziebarth-Morrow Aircraft joint adventure which was entered into in January of 1943? [83]

A. I know the agreement.

Q. That was handled through the American National Bank, was it?

(Testimony of Ernest McCook.)

A. An agreement was sent to us for signature.

Q. You also received from time to time documents for the signature of Mr. Morrow, did you not? A. I did.

Q. I show you Plaintiff's Exhibit 1, which is a letter dated January 10th, 1943, addressed to the American National Bank and signed by Howard Morrow—signed by Morrow Aircraft Corporation by Howard Morrow. Are you familiar with that letter?

A. I have a copy of this letter in my file.

Q. Do you know where that letter was signed, Mr. McCook?

A. I have checked with my secretary against her typewriter. There is no identifying mark on the letterhead and to the best of my knowledge it was prepared on the bank typewriter.

Q. Do you have any independent recollection of Mr. Howard Morrow coming into the bank with reference to the execution of any document concerning the Ziebarth adventure?

A. I don't recall any.

Q. Do you recall any occasion in the early part of January, 1943, when you had any conversation with Mr. Howard [84] Morrow concerning the Ziebarth joint adventure?

A. I do not.

Q. Do you know Mr. Curtis? A. I do.

Q. Did you have any conversations with Mr.

(Testimony of Ernest McCook.)

Curtis there at the bank with reference to the Ziebarth-Morrow Aircraft joint adventure?

A. I don't recall any.

Q. Did you participate in any conference at the Federal Reserve Bank where this joint adventure was being discussed?

A. My first knowledge of the agreement was a call from the Federal Reserve Bank to attend a meeting at the Federal Reserve, which I attended.

Q. Do you recall who was present at that time?

A. Well, I recall Ambrose, head of the Federal Reserve Bank, and Major Taylor and Mr. Finley Ziebarth. I don't recall anyone else.

The Court: Do you remember whether Jesse Curtis was there?

The Witness: I can't state. I can't recall.

The Court: You do not recall anything about the release of this security, that is to withhold foreclosure or any of the transactions about that? Don't you realize that your bank may be responsible for a release of securities? [85]

The Witness: I testified the agreement was sent to us for signature.

The Court: But you said this letter was written on your stationery, probably under instructions.

The Witness: To explain that——

The Court: You knew there was a guarantee by Mr. Morrow, didn't you?

The Witness: I did.

The Court: And you had that?

The Witness: Yes.

(Testimony of Ernest McCook.)

The Court: And you also knew that that guarantee might be affected by any change in the securities, did you not?

The Witness: Right.

The Court: And did you make any inquiry in that respect?

The Witness: I might explain that by saying this particular loan originated through our bank. We had a small interest in it. The principal money was, of course, invested by the War Department and the Federal Reserve and we acted merely as, you might say, an agent. Documents originated through the Federal Reserve and were simply sent to us, sometimes in the form of a memorandum to have written and signed. We took no action.

The Court: You don't remember whether Mr. Morrow signed that guarantee in your bank or not, then? [86]

The Witness: No, sir, I don't.

The Court: Don't you recall any of the circumstances?

The Witness: I don't recall it, I do not, no, sir.

The Court: That is all.

Mr. Veale: No further questions.

Cross-Examination

By Mr. Curtis:

Q. Mr. McCook, you do recall that in November 1942 the Morrow Aircraft Corporation executed to the American National Bank a note in favor of the

(Testimony of Ernest McCook.)

American National Bank in the sum of \$225,000, isn't that right?

The Court: How much?

Mr. Curtis: \$225,000.

A. I don't remember the exact date. I remember the note.

Q. You remember there was a transaction at that approximate time? A. I do.

Q. And that in connection therewith at about the same time, the guarantee, which has been set forth in the complaint here, was executed by Howard Morrow? A. Yes.

Q. There were two guarantees but one of them is executed by Howard Morrow?

A. That is right. [87]

Q. Do you recall what security the bank took for that note?

A. We had an assignment of all the accounts receivable, a chattel mortgage on all the equipment. We had the guarantees.

Q. And you had the pledge of the stock?

A. Pledge of the stock.

Q. And that stock was——

The Court: How did you come to let them have their right eye?

The Witness: They talked us out of it.

Q. (By Mr. Curtis): That stock was 70 per cent of the capital stock in the Morrow Aircraft Corporation and presumably all the stock that Howard Morrow and Frank Morrow held?

A. That is right.

(Testimony of Ernest McCook.)

Q. The bank also took as security an assignment of all proceeds from orders or, in fact, all income that might be derived by the corporation in the future until the loan was paid, isn't that a fact?

A. Accounts receivable, present and future, I believe.

Q. And an assignment of all the proceeds from contracts then in existence?

A. That is right.

Q. Now, this money—furthermore, the note was a note [88] payable on demand or if no demand be made, then on a due date as set forth in the note?

A. I believe it was.

Q. Do you recall? A. (No answer.)

Q. So that the bank was in a position in event the officers or Howard Morrow or Frank Morrow did not cooperate in any stage of the game the note could be called and the bank would foreclose on the stock and put in its own officers in order to protect its security?

Mr. Veale: I think the note and chattel mortgage show that sufficiently, your Honor. I think I will have to further object to further testimony along that line.

Q. (By Mr. Curtis): That was the purpose of putting it in there, wasn't it?

Mr. Veale: That is immaterial.

The Court: I think that is immaterial. I think the court knows as a matter of common knowledge that banks like to have demand notes.

Q. (By Mr. Curtis): This loan was made at

(Testimony of Ernest McCook.)

the time when the financial situation was extremely critical as far as Morrow Aircraft Corporation was concerned? A. That is right.

The Court: They needed the money or they would not have borrowed it, counsel. [89]

Mr. Curtis: It was worse than that. There were overdrafts at that time and checks floating around without sufficient funds.

Mr. Veale: I object to counsel flooding the record with his own testimony.

The Court: I don't see what materiality it has. There is only one question here and I do not see that this witness has established anything by his testimony. It is negative testimony.

Q. (By Mr. Curtis): In connection with this joint adventure agreement there were some negotiations, of course, and some discussions as to what the agreement should contain. You said you were called into Los Angeles to a meeting?

A. That is right.

Q. And isn't it a fact that at that meeting Mr. Finley brought up the question of an agreement on the part of the bank to withhold foreclosure during the term of the joint adventure in order that the Ziebarth people might, with some feeling of security, come in and take over the operations? That was discussed at that meeting, was it not?

A. All points in connection with the agreement were discussed at that meeting.

Q. And in fact there were a number of things that came out in that meeting that your bank, of

(Testimony of Ernest McCook.)

course, with the understanding [90] or the consent of the Federal Reserve, would be required to do?

A. That is right.

Q. And it was tentatively agreed, was it not—didn't your bank and didn't the Federal Reserve at that time indicate a willingness to do that—a willingness, for instance, to agree——

The Court: What materiality is their willingness? These negotiations did not get to a written instrument. The only feature that I am interested in is to find out to what extent Mr. Morrow figured in the picture.

Mr. Curtis: I think this, your Honor, and this is my point. I think there is considerable question as to what the meaning of this letter of January 10th is. Aside from whatever that letter may mean, it is my purpose to show, if possible, that that letter was written after the bank, Ziebarth people and the Federal Reserve and the War Department had all agreed as to what the deal was to be and that there was no reliance whatever placed upon this letter. There was no reliance intended. That in their preliminary negotiations they had all agreed to do these things and that this letter, whatever its purpose may have been, did not further the deal and that there was no reliance of any kind upon it.

The Court: The letter speaks for itself, counsel.

Mr. Curtis: For the record, may I make that as an offer [91] of proof?

The Court: Yes, you may make it as an offer of proof.

(Testimony of Ernest McCook.)

Mr. Curtis: I propose, your Honor, to prove by this witness——

The Court: But you understand that this witness—that this witness, and the court knows as a matter of common knowledge, would like to be friendly to you in the transaction. On the other hand, I also recognize that Mr. Morrow is not liable for this \$100,000.

Mr. Curtis: All I want, your Honor, is the facts.

The Court: In other words, I know both you gentlemen and I know your close ties and Mr. Morrow has been a customer of his. On the other hand, this man has his bank to protect from possible liability by releasing the security that he should not have released, if your contention is correct. If that is true, the Government may have a claim against the bank. As a result of that this man is a negative witness. He doesn't want to hurt you and he doesn't want to get himself in trouble.

Mr. Curtis: He is on the witness stand, your Honor.

The Court: I realize that.

Mr. Curtis: And I think my question is within the purview of the direct examination.

The Court: But it isn't. All he has said is that he doesn't know. He testified he went down to a meeting and [92] this agreement was a result of that meeting at the Federal Reserve Bank. He doesn't even know who was present. He doesn't know whether you were present.

(Testimony of Ernest McCook.)

Mr. Curtis: But he recalls that a representative of the Federal Reserve was present and he was present and Mr. Finley was present, and he can surely testify, or at least I am asking him, whether or not he can testify—maybe he cannot—but I am asking him if he can testify as to whether or not there was an agreement among those people at that time, temporarily it is true.

The Court: I think it is immaterial.

Mr. Veale: We will object to the offer of proof on the ground it is incompetent, irrelevant and immaterial and not within the issues of this case.

The Court: I always permit counsel to protect his record, but it is immaterial. We have the agreement here. That is the agreement you have been relying upon for the release of this security.

Mr. Curtis: That is true. I think that is the crux of the situation as we will get to later, but at least for the record, your Honor, I would like to offer to prove by this witness that at that meeting, at a meeting at the Federal Reserve here in Los Angeles, where there was in attendance Mr. McCook, this witness——

The Court: Counsel, suppose they did have negotiations [93] down here and they agreed those things were going to be done? Those were preliminary negotiations leading up to the agreement.

Mr. Curtis: That is true, your Honor.

The Court: And they had to get the consent of the corporation, no matter what they agreed to.

(Testimony of Ernest McCook.)

They had to get the consent of the corporation before they could do what they did do.

Mr. Curtis: What I want to point out, your Honor, is that there was an agreement among themselves to do these things and——

The Court: Well, I am going to hold that is immaterial.

Q. (By Mr. Curtis): Mr. McCook, do you know who wrote that letter? I am speaking now of Plaintiff's Exhibit 1. You say it was prepared on a typewriter in the bank. Do you know who prepared the copy or who dictated it?

A. This letter before me now?

Q. Yes. A. I do not.

Q. You don't know whether you dictated it or whether the Federal Reserve Bank or who did?

A. I do not.

The Court: Can't you tell by the dictation whether it is yours?

The Witness: It doesn't appear to be mine. [94]

The Court: You don't think it is yours?

The Witness: I will say that.

Q. (By Mr. Curtis): Do you know, Mr. McCook——

The Court: Just a moment.

The Witness: I will say material was sometimes forwarded in memorandum form, for instance, from the Federal Reserve for re-write by us but I couldn't say that that was the case here.

(Testimony of Ernest McCook.)

The Court: You don't know whether that was the case here or not?

The Witness: I do not.

Q. (By Mr. Curtis): Do you know what the purpose of that letter was, Mr. McCook?

A. I think it would be obvious by the letter itself.

Q. Other than the contents of the letter you have no idea what the purpose was?

Mr. Veale: It speaks for itself.

Mr. Curtis: The letter does not say anything. That is the reason I would like to know—it is very ambiguous to say the least. May I continue with the examination?

Q. Now, Mr. McCook, your bank did execute what is called a consent and waiver which has been—which is a part of the file. I will show you Exhibit B attached to the answer—no, it is attached to an affidavit of Jesse W. Curtis, Jr., in the file. It is only a copy, but I will ask you to glance [95] at it and tell us if you remember the import of that agreement? A. I do.

Q. Do you remember that the bank executed it as a part of the transaction wherein the joint adventure agreement was signed and entered into?

A. I do.

Q. In fact, it bears the same date, does it not?

A. I believe it does.

Q. When the bank executed that agreement did you do so in reliance to any extent upon the letter which is Plaintiff's Exhibit 1?

A. (No answer.)

(Testimony of Ernest McCook.)

Q. Or may I put the question the other way. When that was executed upon what did the bank rely in executing that consent and waiver?

A. We will have to go back again to the fact that we were more or less an agent of the Federal Reserve Bank.

Q. But I mean by that, did you rely upon the execution of the letter dated January 10th, signed by Mr. Morrow as president of the Morrow Aircraft Company, or did you rely upon the joint adventure agreement which was dated on the same day that this consent and waiver was executed?

A. We didn't rely particularly on the letter.

Q. As a matter of fact, when you signed that waiver [96] and consent you were relying upon the execution of the joint adventure when you released your right to foreclose, is that not true?

The Court: If you know.

The Witness: I could answer that question. several ways. I assume we were.

Q. (By Mr. Curtis): Well, the waiver and consent was executed by the bank and was to be delivered for use contemporaneously with the execution and delivery for use of the joint adventure agreement, was it not? If the joint adventure agreement was not signed the waiver and consent would not have been signed, is that right? A. That is right.

Q. And if the joint adventure agreement was signed and executed and delivered for use then the

(Testimony of Ernest McCook.)

waiver was to be executed and delivered for us, is that right? A. That is right.

Q. They are part of one deal?

A. (No answer.)

The Court: Well, Mr. McCook, there was only one \$225,000 note executed in favor of your bank, was there not?

The Witness: Yes, sir.

The Court: That was the only one that has ever been executed?

The Witness: Yes, sir. [97]

The Court: And when you talk about the Morrow Aircraft Company wasn't it the Morrow brothers or Morrow Aircraft Company and Mr. Morrow—weren't they all looked upon as one person as far your dealings were concerned?

The Witness: As in the case of the corporation; it was a corporation.

The Court: You knew it was a corporation but the Howard Morrow who is here as a defendant in this case was the one who handled most of the business?

The Witness: Until that time, yes, sir.

The Court: And you were familiar with his signature?

The Witness: I was.

The Court: And when you saw this letter, marked Plaintiff's Exhibit 1, you knew that he had signed it?

The Witness: I did.

(Testimony of Ernest McCook.)

Mr. Curtis: Your Honor, may I ask a further question?

Q. Isn't it a fact, Mr. McCook, that you dealt with Mr. Goodwin almost exclusively during the time he was manager of the Morrow Aircraft Corporation? A. That is right.

Q. How did you know what authority Mr. Goodwin had, or did you know?

Mr. Veale: That would be immaterial, your Honor.

The Court: What was the question?

Mr. Veale: "How did you know what authority Mr. Goodwin [98] had." That would be absolutely immaterial.

Mr. Curtis: Well, I will withdraw the question.

Mr. Veale: It is not contended he had any authority except that he was manager of the corporation—manager of the plant.

The Court: You are wasting a lot of time here.

Q. (By Mr. Curtis): Well, isn't it a fact, Mr. McCook, that you received a letter from Jay Taylor, who was the liaison officer between the War Department and the Federal Reserve Bank, that is, a copy of a letter which was addressed to Howard Morrow, and a copy of which has been introduced here in evidence. I think it is marked Plaintiff's Exhibit A. I show you that letter and I will also show you that it indicates that a copy was addressed to the American National Bank. That letter is dated December 2nd. Did you get a copy of that?

A. I have a copy of it, yes.

(Testimony of Ernest McCook.)

Q. Did you have an opportunity to confirm that with Colonel Taylor at any time?

A. I don't recall, unless it would have been verbally.

Q. And from the time you got that letter isn't it a fact that you dealt with Mr. Goodwin as the representative of the Morrow Aircraft Company?

Mr. Veale: We object to that again as immaterial and [99] irrelevant. It makes no difference who he dealt with.

The Court: I don't see what materiality it is. As a matter of fact, I don't think there is any dispute but what Mr. Goodwin was running the plant during the time that he was manager.

Mr. Curtis: Well, perhaps I was misled by your Honor's inquiry. I thought your Honor asked him if it wasn't a fact the he dealt with Mr. Morrow on all matters pertaining to the corporation.

The Court: Gentlemen, you must recognize that I am familiar with the general picture and know the Morrow Aircraft Company and how they were booted out of their original location and moved to Rialto. I recognize the close relationship between all the parties—many of the parties here, and I am relying a little bit on my general knowledge. I have always understood that Mr. Morrow here was the Morrow Aircraft Company, and I was surprised when I found out it was a corporation. He has been more or less the guiding light in that activity but as to what happened during this particular period I do not have any general knowledge. We

(Testimony of Ernest McCook.)

do have the testimony of Mr. Goodwin here that he did have the final say since December 2nd, I think it is.

Q. (By Mr. Curtis): Mr. McCook, the Morrow Aircraft Corporation, you say, was a customer of your bank—had business transactions as such?

A. They were.

Q. Did Howard B. Morrow as an individual have any dealings with your bank?

A. He did.

Q. In other words, he had an account in his own name? A. Yes, sir.

Q. Borrowed money from time to time in his own name? A. He did.

The Court: Counsel, my comments were without significance.

Mr. Curtiss: No further questions.

The Court: That is all.

Mr. Veale: That is all, Mr. McCook.

If the court please, there is one other matter that I think may be stipulated to and that is that the Federal Reserve—this note that has now been assigned to the Federal Reserve Bank and is in its possession——

Mr. Curtis: If you state that as a fact I will stipulate to it.

The Court: What is the stipulation?

Mr. Veale: The note in question is now the property of the Federal Reserve Bank by assignment.

The Court: There is no question but what the money has been paid to the bank by the United States of America and the United States of America is the real party in interest. [101] There is no question about that, is there?

Mr. Veale: I wanted to be certain that the assignment was in evidence by stipulation, so that the record might be complete.

The Court: Any other testimony?

Mr. Veale: That is all for the Government.

Mr. Curtis: I would like to call Mr. Morrow back to the stand for just a moment.

HOWARD B. MORROW,

called as a witness by and on behalf of the defendant, having been previously duly sworn, was recalled and testified further as follows:

The Clerk: State your full name.

The Witness: Howard B. Morrow.

Direct Examination

By Mr. Curtis:

Q. Mr. Morrow, how many stockholders were there in the Morrow Aircraft Corporation during—

The Court: What materiality is that?

Mr. Curtis: To show that there is a distinction between Mr. Morrow and the Morrow Aircraft Corporation.

The Court: I recognize that from the evidence, counsel.

Mr. Curtis: That is all. No further questions.

The Court: That is all.

Mr. Curtis: May I be sworn, your Honor, and testify as [102] to my own representation in this connection?

The Court: If you are willing to submit yourself to cross-examination.

Mr. Curtis: I will submit myself to it within the limited field of my direct examination.

The Court: All right.

JESSE W. CURTIS, JR.,

called as a witness by and on behalf of the defendant, having been first duly sworn, testified as follows:

The Clerk: State your full name.

The Witness: Jesse W. Curtis, Jr.

The Court: How old are you?

The Witness: I am 41 years of age and I don't look it, do I?

During the years 1942 and 1943 I was an attorney duly licensed to practice in the courts of the State of California and the Federal Court of this District.

During that period I was the attorney for the Morrow Aircraft Corporation. I was not at that time nor had I at any prior time represented Howard B. Morrow as an individual.

I attended a meeting in the office of the Federal Reserve Bank here in Los Angeles, the date I cannot recall, in connection with the negotiations for the joint adventure agreement. As I recall, Mr. Ambrose of the Federal Reserve [103] was there,

(Testimony of Jesse W. Curtis, Jr.)

Major Taylor. I think there were two other gentlemen who represented the War Department whose names I do not now recall; Mr. Finley, Mr. McCook, representing the American National Bank, and I think Murray Carr, who was also a member of the Fritz Ziebarth organization.

The plan as ultimately carried out was set before the group. At that time Mr. Finley stated in justification of the request that the bank withhold foreclosure upon the chattel mortgage during the period of the proposed joint adventure—I say in defense of that. He stated that, of course, the Ziebarth people were not going to take over an operation of this magnitude or the magnitude of the Morrow Aircraft Corporation without being assured that they would have the opportunity to operate without danger from the bank.

Colonel Taylor, I believe, spoke, and in reply to it stated that there would be no question but what that would be agreeable. No one else, as I recall, spoke about it or registered any objection.

That and all the other terms of the agreement were discussed and generally agreed upon, and I was delegated to prepare portions or at least a rough draft, as I recall it, of the joint adventure agreement, which I did. And there followed, I believe, one subsequent meeting at which it was—the provisions were agreed upon.

In the meantime Mr. Ball of Long Beach I think, had [104] re-drafted the agreement and I believe it was the agreement as re-drafted by Mr. Ball

(Testimony of Jesse W. Curtis, Jr.)

which was ultimately signed. You may cross-examine.

The Court: Did you in representing the Morrow Aircraft Corporation consult with Mr. Goodwin?

The Witness: Yes. Mr. Goodwin—I believe I omitted him. He was there I believe.

The Court: Did you consult with him as their attorney?

The Witness: Yes. But at the time Mr. Goodwin went in I was drawing a small retainer from the Morrow Aircraft Corporation. He discontinued that, which I could appreciate. I understood it was necessary. But the understanding was that I was to be paid for the work I did.

The Court: Did you discuss with Mr. Morrow, the defendant in this case, the proposed plan?

The Witness: I did not discuss it with him.

The Court: Did you tell him what was going on?

The Witness: I saw Mr. Morrow frequently and I have no doubt but what I told him many or possibly all of the provisions of the agreement. We had no discussion of it with that as the sole point in view.

The Court: In other words he was familiar with what was going on but your consultations with him were as president of the corporation?

The Witness: No, I would not say I had any conference [105] with him as president of the corporation. I think any conference or and discussions which

(Testimony of Jesse W. Curtis, Jr.)

I had with Mr. Morrow personally during this period were incidental. We saw each other socially.

The Court: You were trying to keep him informed as to what was happening to his plant?

The Witness: Well, I don't think that was necessary. I didn't think it was necessary because the outline of the plan in its major scope was, I believe, discussed with Mr. Morrow or told to Mr. Morrow by Mr. Goodwin. I may have reimpressed that upon him, but I didn't go into all the details of the agreement. As I say, my discussions with him were casual, incidental to other purposes for which we may have met. I saw Mr. Morrow once in a while socially and it was undoubtedly upon those occasions.

The Court: Did you consult with him professionally about this second agreement?

The Witness: No, I would say that I never had any professional discussion with Mr. Morrow about that second agreement.

The Court: So what information he got from you was casual?

The Witness: That is right.

The Court: And was there anything about this agreement relative to withholding foreclosure ever discussed with Mr. [106] Morrow by you?

The Witness: That fact was one of the incidental phases of the agreement. We placed no particular importance on it at that time.

The Court: That was a conclusion you arrived

(Testimony of Jesse W. Curtis, Jr.)

at. You know that lawyers make the poorest witnesses in the world.

The Witness: I know, and I am no exception.

The Court: So just try to answer the question. You will appreciate a little more what other witnesses go through when you and the court find fault with them. But you did discuss with him this agreement whereby the bank was to withhold foreclosure?

The Witness: If I were to answer that strictly I would have to say that I did not, no.

The Court: That is a good answer.

The Witness: I presume that is the answer you want.

The Court: That is all.

Mr. Veale: I don't think cross examination would avail anything. That is all.

The Witness: I would like to make a statement, your Honor. One of the reasons I asked this matter be re-opened, was that I had communicated with Major Taylor, who was Colonel Taylor and who is now a civilian and who has a ranch down in Amarillo, Texas. As soon as I found out where he was I called him and asked him if he would be willing to come [107] up and give his version of the story and he said he would. It was after that that this date was set. Subsequently I got a letter from him saying that the War Department had communicated with him and informed him that since he was still on a reserve status he could not appear here and testify without a clearance from them, whereupon

he wrote them and asked for a clearance which apparently he has never obtained.

I communicated with him by telephone two or three times and he had not heard. I last communicated with him last Saturday. He was in Chicago and he was just about finished there. He said that he was going on to Washington anyway and would take the matter up with the War Department and would endeavor to get a clearance there, and since business would bring him out this way, anyway, he would fly out here and be here for the trial.

He left his address in Washington. I called him Wednesday in Washington at the Mayflower and they said he had just checked out.

Now, I don't know whether he ever got the clearance and I don't know where he is, but he isn't here, and in view of the testimony which has been introduced today I doubt very much whether he would add anything more than to corroborate some of the things which have already been said with respect to Mr. Goodwin's authority. So we will rest at [108] this time with that explanation.

The Court: Gentlemen, I want to be furnished with a transcript of the first hearing, and I would like a transcript of the proceedings of today.

You must remember it has been a number of months since I have heard the first chapter of this.

In addition to that I want the case briefed. Counsel, of course, can cover whatever they desire in their briefs but I am primarily interested in how a person, when they consent as an officer of the corporation, can say that he has not consented indi-

vidually. As I remember the testimony it resolves itself down almost to that close a point.

Mr. Curtis: May we have about two minutes, your Honor?

The Court: I would prefer to have briefs. I think you might file simultaneously, simultaneous briefs with each having the right to answer, or you can file separate briefs.

I want to say that I would like to have this case finally submitted by the first of May.

Mr. Veale: I was going to suggest 10, 10 and 5, your Honor.

Mr. Curtis: That is satisfactory with me.

The Court: That is satisfactory. I think the plaintiff should make the opening brief.

Mr. Veale: I came down here this morning prepared to argue a lot of law. [109]

The Court: I am sorry to disappoint you.

Mr. Curtis: I am prepared, too, your Honor. I would like to be heard.

The Court: Well, I can read better than I can listen, gentlemen. I can come nearer following you in your brief rather than oral argument, and particularly in view of the fact that the testimony at the first hearing has become hazy in my mind.

There has been considerable briefing already and this represents a close point. If it were a simple open and shut case one way or the other I would save you gentlemen the trouble of briefing, but I do recognize there are some close legal points and I would like an opportunity to explore them fully.

Mr. Curtis: I wonder, your Honor, if it would be more convenient if we consolidated all our briefing thus far into the new brief? There have been several memorandums filed. I think your Honor has at least two from each side.

The Court: I am not going to ask counsel to do any more work than is necessary. I haven't gone over the briefs recently. I felt I would have to have a transcript of the testimony before I could study this case and I waited until this morning to hear the balance of the testimony following which I could consider the entire case along with your briefs. However, it may be that counsel in presenting the questions may [110] feel they can better present the points by re-stating what they have heretofore put in their briefs.

Mr. Veale: I believe I would prefer to do that, your Honor. I think it would be the shorter method and more convenient to your Honor in the long run.

The Court: It would be more convenient.

Mr. Veale: As it is, it is kind of piecemeal.

The Court: Yes, it is piecemeal.

Mr. Curtis: Yes, the hearings have been piecemeal and there have been delays hoping settlement could be arrived at and so forth. And there has been everything happen to delay this case.

The Court: Yes; and I am anxious to get it cleared up. If there is nothing further the case will stand submitted upon receipt of your briefs.

(Whereupon, at 12:00 o'clock noon, the above entitled matter was concluded.) [111]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 17th day of April A.D., 1947.

/s/ J. D. AMBROSE,

Official Reporter.

[Endorsed]: Filed April 28, 1948. [112]

[Endorsed]: No. 11923. United States Circuit Court of Appeals for the Ninth Circuit. Howard B. Morrow, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed May 6, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11923

UNITED STATES OF AMERICA,
Plaintiff and Appellee,

vs.

HOWARD B. MORROW,
Defendant and Appellant.

STATEMENT OF POINTS AND DESIGNA-
TION UNDER RULE 19 (CCA9)
(Undocketed)

The above-named defendant and appellant, Howard B. Morrow, hereby formally adopts the Statement of Points heretofore filed in the District Court for the Southern District of California as his Statement of Points required to be filed with the clerk of the above-entitled court under Rule 19 (6).

Pursuant to Rule 19 (6) defendant and appellant presents the following Designation of Parts of the Record which he thinks necessary for consideration on appeal:

1. Complaint on Guaranty with Exhibit "I" attached thereto.
2. Motion to Dismiss for Failure to State a Claim.
3. Affidavit of Jesse W. Curtis, Jr., in support of Motion to Dismiss, with Exhibit "A" attached thereto.

4. Minute Order entered February 4, 1946, Denying Motion to Dismiss.
5. Answer with Exhibits "A" and "B" attached thereto.
6. Reporter's Transcript of Proceedings, dated January 2, 1947.
7. Stipulation for Re-opening Case.
8. Notice of Setting for Further Trial.
9. Reporter's Transcript of Further Proceedings, dated April 4, 1947.
10. Plaintiff's Exhibit 1.
11. Defendant's Exhibit "A."
12. Memorandum Opinion.
13. Findings of Fact and Conclusions of Law.
14. Judgment.
15. Notice of Appeal.
16. Affidavit, Motion and Order Extending Time to Docket.
17. Statement of Points on Appeal.
18. Designation of Record on Appeal.

CURTIS & CURTIS,

By /s/ JESSE W. CURTIS, JR.,

Attorneys for Defendant
and Appellant.

[Affidavit of service by mail attached.]

[Endorsed]: Filed May 6, 1948.